CASE NO.:

In The Supreme Court Of The United States

OCTOBER TERM, 1982

LAKE ERIE ALLIANCE
FOR THE PROTECTION OF THE
COASTAL CORRIDOR, INC., et al.

Petitioners

VS.

UNITED STATES ARMY CORPS
OF ENGINEERS, et al.

Respondents

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a party challenging the sufficiency of an environmental impact statement may present evidence outside of the administrative record to show that the agency did not have adequate information to make a reasoned decision?

2. Whether the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq., circumscribes an agency's right to make decisions which are contrary to the goals and policies set forth in the Act?

3. Whether summary judgment is proper in a case challenging the adequacy of an environmental impact statement where the agency moves for judgment based

solely on the administrative record and where the party challenging the statement demonstrates the probability of significant deficiencies in the EIS?

4. Whether by failing to comply with the procedural safeguards in Section 401 of the Federal Water Pollution Control Amendments of 1972, 33 U.S.C. § 1341, the permit issued by the Corps was rendered invalid?

5. Whether by failing to comply with the requirements of the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661 et seq., the permit issued by the Corps was rendered invalid?

PARTIES TO PROCEEDING BELOW

In addition to the within Petitioners, the following were Plaintiffs - Appellants before the U.S. Court of Appeals for the Third Circuit:

- Tri-State Conference on the Impact of Steel In Ohio, West Virginia & Pennsylvania

- Local 1397, United Steel Workers of America, Homestead, Pennsylvania

The following parties were Defendants-Appellees before the U.S. Court of Appeals for the Third Circuit:

- United States Army Corps of Engineers
- Clifford L. Alexander, Jr.
- Lt. Gen. John Morris

° Daniel D. Ludwig

° George P. Johnson

° Paul G. Leutner

° United States Steel Corporation

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REFERENCES TO OFFICIAL OR UNOFFICIAL REPORTS BELOW

1. An interlocutory order regarding standing may be found at 486 F. Supp. 707 (W.D. Pa. 1980)(J. Knox).

2. The District Court's Memorandum Opinion dated November 23, 1981 has not been published.

3. The U.S. Court of Appeals for the Third Circuit did not write an opinion.

JURISDICTION

The U.S. Court of Appeals for the Third Circuit initially entered judgment for the Respondents on January 25, 1983. The judgment was suspended on January 31, 1983 but was reinstated on February 16,

1983. A timely request for reconsideration was filed but was denied on March 11, 1983. There was no request filed for an extension of time to petition for certiorari. The statutory provisions conferring jurisdiction on this Court to entertain the within Petition for Certiorari are 28 U.S.C. §2101 and 28 U.S.C. §1254(1).

STATUTES, TREATIES & REGULATIONS

Because of the length of such provisions, they are only cited here but are set out in full in the Appendix pursuant to Sup. Ct. R. 21(f):

1. National Environment Policy Act, 42 U.S.C. §§4321 et seq.

2. Federal Water Pollution Control

Amendments of 1972,

33 U.S.C. §§1251 et seq.

3. Fish & Wildlife Coordination Act of 1934,

16 U.S.C. §§661 et seq.

4. Great Lakes Water Quality Agreement of 1978

5. Fed R. Civ. Proc. 56

6. 33 C.F.R. §320.4(b)(1980)

7. 40 C.F.R. §121.2(1981)

STATEMENT OF THE CASE

On June 29, 1979, the U.S. Army Corps of Engineers issued a permit to United States Steel which allowed construction of one of the world's largest steel mills to commence.[1] Shortly after the permit

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[1]Plant construction has not actually begun due to economic conditions in the

was issued, Petitioners - the Lake Erie Alliance, Concerned Citizens of Conneaut, and Downwind Neighbors, all environmental groups, along with certain individuals and labor organizations, filed suit challenging the permit. Inter alia, the Petitioners and other plaintiffs contended that the Corps violated the substantive and procedural duties imposed by the National Environmental Policy Act, 42 U.S.C. §§4321 et seq. They also contended that the Corps issued the permit in violation of certain procedural safeguards in the Federal Water Pollution Control Amendments of 1972, 33 U.S.C. §§1251, and that insufficient weight was given to the consultation requirements in the Fish and Wildlife Coordination Act, 16 U.S.C. §§661 et seq.

[footnote 1 continued] domestic steel industry. The permit expires on December 31, 1983.

After discovery proceedings had commenced, several of the labor organization plaintiffs filed a motion for partial summary judgment on the basis that the Corps failed to consider partial alternatives to the proposed plant. This motion was ultimately denied.

In March, 1981, Respondents filed a consolidated motion for summary judgment. Petitioners and the other plaintiffs responded with a brief in opposition pointing out why a trial to decide the disputed factual issues was necessary. On six selected issues, Petitioners sought summary judgment inasmuch as there were no factual disputes and the applicable law was clear.

District Judge William Knox heard oral argument on July 1, 1981 on the

motions for summary judgment. Unfortunately, he unexpectedly passed away before rendering a decision on those motions. The case was then reassigned to Senior District Judge Gerald Weber who granted Respondents' motion barely two months later. Petitioners timely appealed to the U.S. Court of Appeals for the Third Circuit.

The case was fully briefed in the Court of Appeals and oral argument was heard on January 24, 1983. A Judgment Order affirming the District Court's judgment was entered on January 25, 1983 but was thereafter suspended sua sponte. The Judgment Order affirming the District Court was reinstated on February 16, 1983. A timely petition for a rehearing en banc was filed but was denied on March 11, 1983. In accordance with 28 U.S.C.

§2101(c), Petitioners hereby seek review in this Court and urge that the within Petition for a Writ of Certiorari be granted.

The permit which is the subject of this case was first applied for in 1977. Because the Corps had statutory jurisdiction over activities in Lake Erie, 33 U.S.C. § 410, and because U.S. Steel wanted to fill in an important stretch of one of Ohio's few remaining cold water streams, an activity which also needed a Corps permit, 33 U.S.C. § 1344, U.S. Steel applied to the Corps before seeking the myriad of other permits necessary. The Corps determined that the project was a "major federal action" under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, and thus became obliged to prepare an environmental impact

statement. This statement was to serve as a primary source of information about environmental impacts and alternatives to the proposed plant.

The manner in which the Corps prepared the EIS and the quality of the finished product is the gravamen of Petitioners' case. Instead of objectively studying the impacts, the Corps relied excessively and unlawfully on U.S. Steel. Instead of confronting the tough questions and demanding data, the Corps capitulated. The Corps deferred consideration of impacts to others at later times. It failed outright to study or evaluate certain critical effects. And finally, it made no effort to apply NEPA's substantive goals and policies to the decision it ultimately made.

Throughout this litigation, Petitioners have sought merely the right to adduce evidence demonstrating that the EIS is inadequate and was prepared in bad faith. Despite the standards in Fed. R. Civ. Proc. 56 and the presence of genuine issues of material fact, Petitioners have been rebuked. The District Court concluded that NEPA merely required "consideration" of environmental impacts and, if such consideration was evident, Petitioners were not free to challenge its adequacy, validity, or methodology. By affirming per curiam, the Third Circuit apparently agreed with this view. Unless reversed, the decisions below will have gone very far toward reducing NEPA to an almost meaningless role.

REASONS FOR CERTIORARI

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS ON THE ROLE OF THE JUDICIARY IN EVALUATING COMPLIANCE WITH NEPA'S SUBSTANTIVE AND PROCEDURAL REQUIREMENTS AND TO CLEAR UP CONFUSION AS TO WHEN SUMMARY JUDGMENT IS APPROPRIATE IN SUCH CASES.

1. Petitioners Were Unlawfully Denied An Opportunity to Challenge the Adequacy of the EIS Prepared by the Corps.

The District Court's decision to grant summary judgment for the Respondents --- and the Third Circuit's per curiam decision affirming it -- effectively denied Petitioners an opportunity to demonstrate that the EIS inadequately

addressed environmental impacts and alternatives and was prepared in bad faith. The lower courts based their decision on the view that NEPA merely requires some degree of "consideration" of environmental impacts and alternatives. The courts reasoned that as long as some "consideration" is apparent, those who seek to challenge either the basis for or the actual decision itself are without any rights at all.

It is well settled that an EIS should provide the decision-maker with sufficient information about the environmental risks and alternatives of a project so that a reasoned decision consistent with NEPA's policies can be made. County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1375 (2d Cir. 1977); Sierra Club v. Morton, 510 F. 2d

813, 819 (5th Cir. 1975); Kleppe v. Sierra Club, 427 U.S. 390 (1976). Prior to the decision in the case at bar, no federal court had held that an agency merely needed to "consider" environmental impacts and alternatives and that proof of some degree of consideration - no matter how cursory or inept -- entitled the agency to, a fortiori, summary judgment.

This Court's decisions in Vermont Yankee Nuclear Power Corp. v. N.R.D.C., 435 U.S. 519 (1978) and in Stryker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980) (per curiam) certainly do not so hold. In Vermont Yankee, this Court noted that the duties imposed by Section 102(2)(c) of NEPA, 42 U.S.C. § 4332(2)(c) were "essentially procedural," Id. at 558, but it nowhere said that courts

should merely look to see if an issue was "considered" and, if so, conclude as a matter of law that NEPA's duties were met. Similarly, in Stryker's Bay Neighborhood Council v. Karlen, this Court, while perhaps in somewhat overbroad language, held only that a court was not free to substitute its judgment for that of the agency. As Justice Marshall noted in dissent, if the courts are reduced to the "essentially mindless task of determining whether an agency 'considered' environmental factors in reaching its decision," the salutary purposes of NEPA will have been completely eviscerated. Id. at 231.

The role of the judiciary in evaluating an agency's compliance with NEPA is a recurring theme throughout the many decisions interpreting and applying this important statute. The case at bar

presents an ideal vehicle to clarify definitively what the role of the judiciary is and how it should be carried out.

In addition, the decision in the case at bar which precluded Petitioners from challenging the adequacy of the EIS and the good faith of the Corps is in direct conflict with a decision in at least one other circuit. Sup. Ct. R. 17(c) recognizes that such a conflict is one of the factors relevant to a decision on whether to grant certiorari. In County of Suffolk v. Secretary of Interior, 562 F. 2d 1368 (2d Cir 1977), cert. denied, 434 U.S. 1064 (1978), the Court considered whether a party challenging the adequacy of an environmental impact statement was limited to the administrative record produced by the agency or whether additional testimony designed to

shed light on the adequacy of that record was permissible. The Court correctly concluded that

> [a]lthough the focus on judicial inquiry in the ordinary suit challenging nonadjudicatory, nonrulemaking agency action is whether, given the information available to the decision-maker at the time, his decision was arbitrary or capricious, and for this purpose "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138 [alternative citations and footnote 8 omitted]. In NEPA cases, by contrast, a primary function of the court is to insure that the information available to the decision-maker includes an adequate discussion of environmental effects and alternatives [citations omitted] which can sometimes be determined only by looking outside of the administrative record to see what the agency may have ignored [emphasis in original]

562 F. 2d 1368, 1384.

The Court in County of Suffolk went on to explain that

> [a] suit under NEPA challenges the adequacy of the administrative record itself - the EIS. Glaring sins of omission may be evident on the face of the statement. See, egs. Chelsea Neighborhood Associations v. United States Postal Service, 516 F.2d 378 (2d Cir. 1975); Silva v. Lynn, 482 F. 2d 1282, 1283 (1st Cir. 1973). Other defects may become apparent when the statement is compared with different parts of the administrative record. [footnote 9 omitted]. See, e.g., I-291 Why? Association v. Burns, 372 F. Supp. 223 (D. Conn. 1974), Aff'd per curiam, 517 F.2d 1077 (2d Cir. 1975). Generally, however, allegations that an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept 'stubborn problems or serious criticism...under the rug,' Silva v. Lynn, 482 F.2d at 1285, raise issues sufficiently important to permit the introduction of new evidence in the district court, including expert testimony with respect to technical matters... in challenges to the sufficiency of an environmental impact statement... [Emphasis supplied].

Id. at 1385.

In contrast to the Second Circuit's treatment of allegations challenging the adequacy of an EIS, the District Court

and the Third Circuit, by its per curiam affirmation of the lower court's decision, totally precluded Petitioners from demonstrating that the EIS for the Lakefront Plant did not adequately address the serious environmental consequences of building the plant and the reasonable alternatives available which could avoid or at least minimize those consequences. The District Court, despite being presented with evidence that the EIS was woefully inadequate in a number of critical areas, merely counted up the pages of the EIS devoted to a given topic and summarily declared the Corps' consideration sufficient. It thus granted Respondents' motion for summary judgment since it believed as a matter of law that NEPA required only "consideration" of environmental impacts and alternatives and that no evidence showing

how poor this "consideration" was would disturb this conclusion.

If NEPA requires only that an agency give some modicum of "consideration" to environmental impacts, and the quality and adequacy of that "consideration" is not subject to judicial review other than that which was undertaken in the case at bar, then this salutary statute designed by Congress to make "environmental protection part of the mandate of every federal agency" Calvert Cliffs Coordinating Committee v. U.S. Atomic Energy Commission, 449 F. 2d 109, 112 (D.D.C. 1971) has been judicially eviscerated. If those who are aggrieved and adversely affected by a decision based on an EIS which does not meaningfully, accurately, or in good faith consider environmental impacts and alternatives have no right to

demonstrate that the EIS is inadequate, then the statutory goals and policies of NEPA are of no importance. If this decision stands, NEPA's role in environmental protection will be destroyed.

2. Summary Judgment Was Improper Because There Were Genuine Issues of Material Fact In Dispute Regarding the Adequacy of the EIS and Regarding Whether the Corps Acted In Good Faith In Preparing It.

A second and even more elementary reason for granting the within Petition for Certiorari is that the District Court and the U.S. Court of Appeals for the Third Circuit ignored Rule 56 of the Federal Rules of Civil Procedure and a well-established body of case law holding that summary judgment is never appropri-

ate where there are genuine issues of material fact in dispute and where the movant fails to demonstrate entitlement to judgment as a matter of law. Fountain v. Filson, 336 U.S. 681 (1956); Poller v. Columbia Broadcasting System, 368 U.S. 464 (1961); First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1969); See, 10 Wright & Miller, Federal Practice & Procedure §§ 2711 et seq. Unless, as discussed above, NEPA requires no more than "consideration" of environmental impacts and alternatives, which consideration is unreviewable, the lower courts committed reversible error by granting summary judgment in the face of numerous serious questions of fact regarding the adequacy of the EIS.

In particular, Petitioners showed that the adequacy of the Corps'

consideration of air pollution impacts, water pollution effects, solid and hazardous waste generation, and socio-economic impacts, among others, was very questionable. Petitioners showed why the data relied on by the Corps were insufficient and how the Corps had relied blindly on U.S. Steel's data and analysis. They also showed how stubborn problems such as how air and water quality standards could be met when the Corps did not have sufficient design information, were swept under the rug. And they showed how incorrect assumptions about population growth would have major adverse consequences to the entire region. Respondents denied the allegations and claimed that the "consideration" given was adequate. Therefore, on each of these as well as on other points, Petitioners sought merely an opportunity to have the District Court

resolve the factual disputes and, on the basis of the record as supplemented by expert testimony, make an informed decision.

Sup. Ct. R. 17(c) provides that one decisional factor in considering whether to grant a Petition for Certiorari is whether the decision below conflicts with applicable decisions of this Court. Petitioners submit that the District Court violated the clear dictates of Fed. R. Civ. Proc. 56 by granting summary judgment in the face of obvious factual conflicts as did the Third Circuit Court of Appeals by affirming the District Court's erroneous judgment. Accordingly, Petitioners respectfully request that their Petition be granted to correct this serious error.

In addition to the existence and demonstration of factual disputes regarding the adequacy of the environmental assessment, Petitioners also demonstrated that there was a genuine issue of fact regarding whether the Corps acted objectively and in good faith in compiling the EIS. Good faith is a well-recognized and certainly necessary requirement in compiling an EIS. County of Suffolk v. Secretary of Interior, 562 F. 2d 1368,1375 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978; Calvert Cliffs Coordinating Committee v. United States Atomic Energy Commission, 449 F. 2d 1109 (D.C. Cir. 1971). Petitioners demonstrated to the lower courts two factual bases for the assertion that the Corps acted in bad faith. First, they showed that, although U.S. Steel and the Corps denied the existence of plans to expand the capacity

of proposed plant from 7.5 million metric tons of liquid steel per year, such plans actually existed and that the eventual size of the plant would be 15 million liquid tons. All of the environmental impact projections were premised on the lower figure which means that these impacts are severly understated.

The second factual basis showing evidence of bad faith is misrepresentation of authorship and abrogation of responsibility for the EIS. NEPA expressly required the Corps to remain responsible for the scope, objectivity and content of the statement. 42 U.S.C. § 4332. See, Green County Planning Board v. Federal Power Commission, 455 F. 2d 412 (2d Cir. 1972) cert. denied, 409 U.S. 849 (1973). However, Petitioners uncovered and presented evidence showing

that a vast majority of the EIS was actually written by U.S. Steel - to wit: 71.7% of the paragraphs in the EIS were the same or substantially the same as those in U.S. Steel's Environmental Impact Assessment (EIA), a document which U.S. Steel produced as "input" for the EIS. Moreover, 88.9% of the tables and 87.9% of the figures in the final EIS were the same as those in the EIA. Nowhere in the EIS were these facts revealed. What's more, Petitioners uncovered and presented to the courts below the fact that as the EIA was finished it was sent to the Corps on magnetic tape so that the EIA could be easily edited and reproduced in a different typeface as the work of the Corps! Despite this evidence and the existence of a genuine factual dispute over whether the Corps acted in bad faith by allowing

U.S. Steel to write most of the EIS, the lower courts upheld summary judgment.

3. The Petition for a Writ of Certiorari Should Be Granted So That The Question of Whether and to What Extent NEPA Imposes Substantive Limits On the Choices Available to a Decision-Maker Can be Considered Definitively.

One of the most perplexing and difficult issues involving NEPA is whether it has a substantive component which in some way circumscribes the decision-making prerogatives of those subject to it. Petitioners argued below that NEPA imposes substantive limits. Respondents disputed this claim mostly on the strength of obiter dictum from Vermont Yankee Nuclear Power Corp. v. N.R.D.C., 435 U.S. 519 (1978) and Stryker's Bay Neighborhood

Council v. Karlen, 444 U.S. 223 (1980) (per curiam). Petitioners contend that the substantive goals and policies of NEPA[2] are part of the mandate of every

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[2]Among other things, Congress therein recognized the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of "... industrial expansion [and] resource exploitation" and declared it to be "the continuing policy of the Federal Government... to use all practical means and measures... to create and maintain conditions under which man and nature can exist in productive harmony." 42 U.S.C. § 4331(a). In Section 101(b), 42 U.S.C. § 4331(b), Congress more specifically stated the objectives of the Act including

> (1)fulfill[ing] the responsibilities of each generation as trustee of the new environment for succeeding generations [and] the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

These policies and goals are given the force of law in section 102(1) as follows:

> The Congress authorizes and directs that, to the fullest extent possible: (1) The policies, regulations and

federal agency and circumscribe its ability to make decisions contrary to those goals and objectives. Calvert Cliffs Coordinating Committee v. U.S. Atomic Energy Commission, 449 F. 2d 1109, 1112 (D.C. Cir. 1971). The substantive goals and policies of NEPA gain the force of law and thereby affect an agency's power to make decisions contra to those goals by virtue of Section 102 of the Act:

> ...to the fullest extent possible ...[t]he policies, regulations and public laws of the United States shall be interpreted in accordance with the policies set forth in this Act.

42 U.S.C. § 4332(1)(emphasis supplied). Thus, the plain meaning of Section 102 is

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[footnote 2 continued] public laws of the United States shall be interpreted in accordance with the policies set forth in this Act...

42 U.S.C. § 4332(a) (emphasis supplied).

that agencies are limited in their decision-making.

While NEPA is assuredly more than merely an environmental disclosure statute, there is significant confusion over the extent to which the policies and goals of NEPA limit decision-makers. A number of courts have construed the Act as requiring a cost-benefit analysis. For example, in Calvert Cliffs Coordinating Committee v. United States Atomic Energy Commission, 449 F. 2d 1109, 1113 (1971), (D.C. Cir. 1971), the Court said that

> [in] order to include all possible environmental factors in the decisional equation, agencies must identify and develop methods and procedures *** which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and

> technical considerations. To 'consider' the former 'along with' the latter must involve a balancing process. In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not. But NEPA mandates a rather finely tuned and 'systematic' balancing analysis in each instance. (Emphasis supplied.)

However, such analyses necessarily involve valuing environmental costs and benefits and have often resulted in intractable disputes between experts on the value of environmental amenities.

An alternative is emerging which avoids the practical evidentiary problems of valuing environmental amenities and which is more in harmony with the statutory language. This alternative is to view NEPA's substantive command to be that an agency, based on the results of the EIS, select the least environmentally adverse alternative unless other essential

considerations of national policy dictate that a more environmentally adverse alternative be selected. See Note, The Least Adverse Alternative Approach to Substantive Review Under NEPA, 88 Harv. L. Rev. 735 (1974); Liebsman, The Council on Environmental Quality's Regulations To Implement the National Environmental Policy Act - Will They Further NEPA's Substantive Mandate? 10 Env. L. Rev. 50039 (1980). This standard insures that an agency has taken seriously its obligation under NEPA to use all practical means consistent with other essential considerations of national policy to achieve the environmental goals in Section 101 while nevertheless giving agencies necessary discretion to select among alternatives provided their selection is justified.

The least-adverse alternative standard is supported fully by NEPA's legislative history. As one commentator has noted,

> [o]n close examination, the mandate to 'use all practicable means, consistent with other essential considerations of national policy' requires more than just a good faith balancing of environmental costs and benefits. In fact, Senator Jackson stated during debate on NEPA that 'any adverse effects which cannot be avoided...[must be] justified by some other stated consideration of national policy.' This requirement of 'justification' implies that federal agencies must either select the least-adverse alternative or that a careful evaluation of national policy considerations be made to support another choice... [t]his formulation would appear to require the imposition of the strongest possible mitigation to minimize impact, insuring that the original intent of Congress under § 101 will be met.

Liebsman, supra, at 50043 (footnotes and citations omitted).

This Court has yet to address squarely the extent to which the policies and objectives of NEPA circumscribe an agency's choices in decision-making. In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978), conflicting messages were given. While characterizing in dicta NEPA's duties as "essentially procedural," Id. at 558, this Court nevertheless recognized that "[a]dministrative decisions should be set aside in [the NEPA context] as in every other, only for procedural or substantive reasons as mandated by statute." Ibid. (Emphasis supplied). Justice Marshall has wisely cautioned that the remark about NEPA's duties being "essentially procedural" must be considered in context and does not permit the conclusion that there is no substantive component of

NEPA. Stryker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 230 (1980).

Similarly, this Court's decision in Stryker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980) (per curiam) does not gainsay the conclusion that NEPA imposes limits on the ability of an agency to take actions contrary to the letter and spirit of Section 101 of the Act. This Court said that it was error for a court to require a federal agency to give dispositive weight to social environmental factors such as overcrowding to the exclusion of other reasonable, but countervailing factors, in deciding whether to proceed with construction of a low-income housing project in New York City. See, also, Karlen v. Harris, 590 F. 2d 39, 44-45 (2d Cir. 1978). Although the Court briefly discussed whether

environmental considerations could be elevated arbitrarily above all others in making a decision subject to NEPA and concluded that they could not, 444 U.S. at 227-28, the focus of the opinion and the holding of the case is that a court may not substitute its judgment for that of the agency where there are valid choices to be made and the agency has justified its choice.

Justice Marshall dissented from what he said were overbroad statements about NEPA. He correctly pointed out that substantive review is essential to insure that environmental consequences, once identified through NEPA's procedural requirements, are not ignored. He characterized the question of whether an agency could elevate environmental matters above all others as

> ...essentially a restatement of the question whether HUD in considering the environmental consequences gave them a hard look which is exactly the proper question for the reviewing court to ask... I do not subscribe to the Court's apparent suggestion that Vermont Yankee limits the reviewing court to the essentially mindless task of determining whether an agency considered environmental factors even if that agency may have effectively decided to ignore those factors in reaching its decision. Indeed, I cannot believe that the Court would adhere to that position in a different factual setting.

Stryker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 231 (1980).

The case at bar is indeed a dramatically different setting. The lower courts concluded that NEPA has no substantive component at all and that summary judgment was therefore proper because some "consideration" had been given. NEPA is meaningless unless the procedural component which requires information gathering is not co-joined with substantive

limits. If NEPA has a substantive component, then this Court should declare and define it for the large number of Federal courts which continue to struggle with this question.

II

PETITIONERS' REQUEST FOR A WRIT OF CERTIORARI SHOULD BE GRANTED SO THAT THE CORPS' COMPLIANCE WITH CERTAIN SPECIFIC REQUIREMENTS OF NEPA, THE FEDERAL WATER POLLUTION CONTROL AMENDMENTS OF 1972 AND THE FISH AND WILDLIFE COORDINATION ACT CAN BE REVIEWED.

Allowance of the Writ would permit review to determine whether the principles applicable to summary judgment set forth in Fed. R. Civ. Proc. 56 were properly applied in several unique factual and

legal contexts. As noted above, the District Court entered and the U.S. Court of Appeals for the Third Circuit affirmed summary judgment for the Respondents on all issues. On certain issues the lower courts strayed very far from the principles underlying summary judgment. Instead of granting Respondents' motion, the lower courts should have granted Petitioners' Motion since there were no genuine issues of material fact in dispute and since Petitioners demonstrated their entitlement to judgment as a matter of law.

1. The Corps Violated NEPA by Failing to Consider Costs, Partial Alternatives, The Great Lakes Water Quality Agreement of 1978, and a Number of Environmental Impacts.

The first issue on which summary judgment should have been entered for the Petitioners concerned the Corps' failure to consider either partial alternatives or cost data in assessing alternatives to the proposed plant. The relevant case law and applicable regulations impose a burden on the Corps to consider both cost data and partial alternatives.[3] Unfortunately, the lower courts avoided these issues and in one case did so in direct contravention of the well-established law of the case doctrine.

The District Court's treatment of Petitioners' argument that partial alternatives were not considered centered on the factual assertion -- totally

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[3]On the duty to consider cost data see: Calvert Cliffs Coordinating Committee v. U.S. Atomic Energy Commission, 449 F. 2d 1109 (D.C. Cir. 1971); Columbia Basin Land Protection Association v.

rebutted in the Record -- that Petitioners failed forcefully to bring partial alternatives to the Corps' attention. As was pointed out to both lower courts, Petitioners were especially forceful and direct in noting and urging consideration of a number of partial alternatives that would minimize the human and physical environmental trauma that would be caused by construction and operation of the proposed plant.

[footnote 3 continued] Schlesinger, 643 F. 2d 586, 594 (9th Cir. 1981); CEQ Guidelines: 40 C.F.R. Section 1500.8(c)(4) (1978); Corps Regulations: 33 C.F.R. Section 209.410 (i)(7)(iii) (1978). As to partial alternatives, see: Natural Resources Defense Council, Inc. v. Morton, 458 F. 2d 824 (D.C. Cir. 1972); Natural Resources Defense Council, Inc. v. Administrator, ERDA, 451 F. Supp. 1245 (D.D.C. 1978); CEQ Guidelines: 40 C.F.R. Section 1500.2(b)(1981); 40 C.F.R. Section 1500.8(a)(4) (1978).

Moreover, the District Court and by virtue of its affirmance, the Third Circuit, ignored the fact that Judge Knox had, prior to his death, expressly ruled that partial alternatives had been presented by the Petitioners to the Corps. See, Memorandum Opinion, September 9, 1980 at 4. Thus, Judge Weber, the successor judge, was bound by this determination by virtue of the long-recognized and well-advised doctrine of the law of the case. See, Hayman Cash Register Co. v. Sarodin, 669 F. 2d 162, 165 (3d Cir., 1982); Todd and Co., Inc. v. S.E.C., 637 F. 2d 154, 156 (3d Cir. 1980).

The District Court and the Third Circuit simply ignored the contention that cost data should have been, indeed

were required to be, considered and evaluated in the final EIS. Petitioners demonstrated why such cost data were crucial in evaluating this project and showed that even the Corps' own consultant was deeply disturbed by the absence of such data and analysis.

The second contention on which Petitioners were entitled to summary judgment concerned the Corps' failure to give any consideration to a vital part of the Great Lakes Water Quality Agreement of 1978. The only consideration given to the entire Agreement, which obliges the United States and Canada to take a number of steps to reduce discharge of water pollutants into the Great Lakes system, is a notation that the Agreement exists in response to a comment on the draft

EIS. Critically, this notation included no discussion or even recognition that the Agreement commits the signatories to "virtually eliminate" discharges of persistent toxic substances by the end of 1983. By failing to note, much less explain, the irony of permitting U.S. Steel to discharge many persistent toxic substances at the same time as implementing a policy to virtually eliminate such discharges, the Corps breached its duty under NEPA.

Summary judgment in favor of Petitioners should also have been granted on the Corps' failure to consider certain environmental impacts. For example, U.S. Steel owns a company called the Pittsburgh & Conneaut Dock Company which owns and operates raw material handling and

storage facilities in and around Conneaut harbor. After the proposed plant was announced, these raw material facilities, including rail facilities, were greatly expanded in anticipation of the needs of the proposed plant. The Corps failed to take the environmental impacts of this expansion into account. Recognizing this, Respondents argued that the expansion was "unrelated" to the proposed mill. The District Court could not countenance this argument but it did accept Respondents' argument that these efforts were considered when it was plain from the record that they were not.

Other environmental impacts which the Corps did not consider included the biological effects of air pollutants on the economically important grape and

nursery industries which have thrived in the area because of the unique microclimate created by shallow Lake Erie. The Corps likewise failed to assess the long-term impacts of contaminated effluent on aquatic species in the Lake. Further, the Corps failed to obtain or even demand of U.S. Steel that it provide detailed design information on which reasoned engineering judgments could be made. Thus, the computations of air and water pollutants likely to be emitted from the plant are at best very crude estimates which in all likelihood will not come close to conforming to what may actually occur if the plant is built.

On each of these issues, Petitioners were entitled to summary judgment since there were no issues of fact in dispute

and since as a matter of law NEPA required that they be competently, objectively and adequately addressed in the EIS.

2. The Permit Issued by the Corps Is Invalid Because It Did Not Comply With the Procedural Safeguards In Section 401 of the Federal Water Pollution Control Act, 33 U.S.C. § 1341.

The fourth group of issues on which Petitioners were entitled to summary judgment concerned U.S. Steel's and the Corps' failure to comply with the certification and referral requirements in Section 401 of the Federal Water Pollution Control Act, 33 U.S.C. § 1341. That Section requires any applicant for a Federal license for an activity which may result in discharges into navigable

waterways to first obtain a certificate from the state in which the discharge originates showing that such discharges will comply with other sections of the Federal Water Pollution Control Act. The Section expressly forbids issuance of any Federal license until such a certification is obtained. U.S. Steel failed to obtain a valid Ohio certification and made no attempt to obtain one from the Commonwealth of Pennsylvania even though some of the discharges from the plant would originate in Pennsylvania.

With regard to the Ohio certification, U.S. Steel applied for and received a document purporting to be a certification but it was invalid for two reasons. First, it did not comply with U.S. EPA's regulations relating to state certifications in that it did not contain a

statement that "there is a reasonable assurance that the activity will be conducted in a manner that will not violate water quality standards." 40 C.F.R. § 121.2(1981). The Ohio certification did not and could not contain such an assurance because the EIS - despite its other shortcomings - revealed that the plant would seriously violate Ohio's water quality standards. The other reason why the certification was invalid was that the Act and the Corps' own regulations, 33 C.F.R. § 320.4(b)(1980), require that the state certification apply to both construction and operation. The Ohio certificate - again because of the inability of U.S. Steel to meet Ohio water quality standards - applied only to construction.

The District Court and the Third Circuit avoided these issues by determining that the doctrine of res judicata precluded Petitioners from raising these issues. This determination was based on the fact that one Petitioner - the Lake Erie Alliance - raised these questions before an Ohio agency called the Environmental Board of Review. That agency found the Ohio certification to be valid. The lower courts, however, incorrectly applied the doctrine of res judicata to all other Petitioners who were neither in privity with the Alliance nor had standing to sue since they were and are Pennsylvania citizens. G.C. Merriam Co. v. Saafield, 241 U.S. 22(1916).

U.S. Steel's failure to obtain a Pennsylvania certification was even more

glaring. Although the plant will be partly located in Pennsylvania and although some of the watercourses into which U.S. Steel will discharge - either during plant construction or operation - are located in whole or in part in Pennsylvania, no application for certification was ever made. On its face, therefore, the Corps' permit is invalid because U.S. Steel did not acquire the necessary certification from Pennsylvania.

Finally, the Corps violated the referral procedure set out in Section 401(a)(2), 33 U.S.C. § 1341(a)(2). That procedure requires the Corps, once it receives one or more valid state certifications, to immediately notify the Administrator of the U.S. Environmental Protection Agency. The Administrator is

required to make a determination within thirty days whether the "quality of the waters of any other State [may be affected by issuance of the certification]" and, if so, notification is to be given to such other state(s), to the applicant, and to the permitting agency. 33 U.S.C. §1341(a)(2). The affected state is then to have an opportunity to request a hearing at which the public would be permitted to testify. Section 401(a)(2) expressly precludes issuance of a permit where, as a result of this hearing, "imposition of conditions cannot insure...compliance [with applicable water quality requirements]." Id.

It is undisputed that the Corps did not formally notify U.S. EPA that it had received the purported Section 401 certificate from Ohio. Respondents' lame

excuse for not having done so is that "[R]epresentatives of EPA, Regions III and V, and members of the Technical team, were fully informed of Ohio's action." [Respondents' Brief in Support of Summary Judgment, at 66]. The District Court improperly accepted this excuse adding that the "record is replete with references to the exchange of information between federal and state representatives." Memorandum Opinion, November 23, 1981, at 23. The U.S. Court of Appeals for the Third Circuit apparently agreed. However, neither of the lower courts nor the Respondents cited any evidence that either U.S. EPA or the Commonwealth of Pennsylvania had even constructive notice of Ohio's action.

Section 401(a)(2)'s requirements are the law of the land. They do not apply

differentially. They come into force whenever and wherever an applicant for a Federal license or permit seeks authorization to conduct any activity including construction or operation of facilities which could result in discharges to the navigable waters of the United States. Clearly, U.S. Steel seeks to discharge pollutants into the navigable waters of the United States during construction and operation and into watercourses in both states. Thus, Section 401(a)(2)'s referral requirements are applicable and must be complied with.

3. The Permit Issued By the Corps Is Invalid Because the Corps Failed to Comply with the Fish & Wildlife Coordination Act, 16 U.S.C. §§ 661 et seq.

Petitioners contend that Corps violated both the letter and spirit of the Fish and Wildlife Coordination Act of 1934, 16 U.S.C. §§ 661 et seq. That Act requires full consultation with Federal and state wildlife agencies whenever the waters of any stream or other body of water are proposed to be diverted, channelled, or otherwise modified. 16 U.S.C. § 662. The statute contemplates that such consultation will conserve wildlife resources by preventing loss of and damage to such waterways. Id. at 662(a). To ensure full consultation, the Act requires reports of the wildlife agencies to become an integral part of any report prepared

> "... by an agency of the Federal Government... when such reports are presented to... any agency or person [empowered] to... authorize... construction of water-resource development projects."

Id. at 662(b). These requirements establish a national policy requiring that the wildlife conservation aspects of any project be explored and evaluated. Udall v. Federal Power Commission, 378 U.S. 428, 443-444 (1967). Failure to consider adequately wildlife implications of a proposed action is both a violation of the Fish and Wildlife Coordination Act and NEPA. Cape Henry Bird Club v. Laird, 359 F. Supp. 404 (W.D. Va.), aff'd, 484 F. 2d 453 (4th Cir. 1973); Environmental Defense Fund, Inc. v. Froehlke, 73 F. 2d 346 (8th Cir. 1972).

The Fish and Wildlife Coordination Act, and the Corps' regulations implementing it, require that active and full consideration be given to the views of appropriate wildlife agencies. Thus, Section 661 of the Act requires

> [t]he reporting officers in project reports...[to] give full consideration to the report and recommendations of the Secretary of the Interior and to any report of the State agency on the wildlife aspects of [a] project [], and the project shall include justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits (emphasis supplied).

Id. at 662(b). Likewise, the Corps' own regulations specifically require decision-makers to

> give great weight to [the views of wildlife agencies] on fish and wildlife considerations in evaluating the application. The applicant will be urged to modify his proposal to eliminate or mitigate any damage to such resources, and in appropriate cases the permit may be conditioned to accomplish this purpose (emphasis supplied).

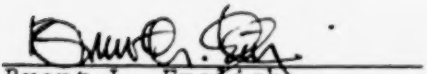
An agency is obligated to comply with its own regulations. Feliciano v. Laird, 426 F. 2d 424, 429 (2d Cir. 1970); Natural Resources Defense Council, Inc. v. Callaway, 524 F. 2d 79, 96 (2d Cir.

1975). Petitioners brought forth evidence in response to Respondents' motion for summary judgment showing that numerous agencies felt that very little serious consultation had been done and even less weight given to their views in the entire EIS process. However, instead of waiting to hear from the agencies themselves, the District Court decided all inferences favorably to U.S. Steel and the Third Circuit affirmed. This is impermissible and must be reversed.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that a Writ of Certiorari be granted.

Respectfully submitted,



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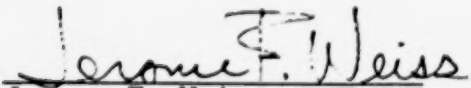

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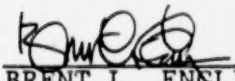

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Appendices

1. National Environmental Policy Act, 42 U.S.C. §§4321 *et seq*.

2. Relevant Sections of the Federal Water Pollution Control Amendments of 1972, 33 U.S.C. §§1251 *et seq*.

3. Relevant Sections of the Fish and Wildlife Coordination Act of 1934, 16 U.S.C. §§661 *et seq*.

4. Great Lakes Water Quality Agreement of 1978.

5. Regulations of the U.S. Army Corps of Engineers related to the Fish and Wildlife Coordination Act, 33 C.F.R. §320.4(b)(1980)

6. Regulations of the U.S. Environmental Protection Agency related to certification by states pursuant to 33 U.S.C. §1340; 40 C.F.R. §121.2(1981).

7. All docket entries made by the United States Court of Appeals for the Third Circuit in Case No. 82-5156 including the initial *per curiam* decision rendered on January 25, 1983, the subsequent order suspending the January 25, 1983 order, the subsequent order of February 16, 1983 reinstating the initial decision, and the March 11, 1983 decision declining rehearing *en banc*.

8. Copy of the Hon. Judge Weber's decision granting Respondents'

Consolidated Motion for
Summary Judgment dated
November 23, 1982.

9. Copy of the Hon. Judge Wm. Knox' order of September 7, 1981 on cross-motions for partial summary judgment.

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Pages 63 to 73

CHAPTER 55—NATIONAL ENVIRONMENTAL POLICY

Sec.

§ 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecolog-

ical systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Pub.L. 91-190, § 2, Jan. 1, 1970, 83 Stat. 852.

Historical Note

Short Title. Section 1 of Pub.L. 91-190 provided: "That this Act [enacting this chapter] may be cited as the 'National Environmental Policy Act of 1969'."

Transfer of Functions. Functions of the Environmental Protection Agency and the officers and components thereof as relate to or are utilized in connection with research, development, but not assessment or monitoring for regulatory purposes, of alternative automotive power systems, transferred to and vested in the Administrator, Energy Research and Development Administration, see section 5814(g) of this title.

Prevention, Control, and Abatement of Environmental Pollution at Federal Facilities. Ex.Ord.No.11752, Dec. 17, 1973, 38 F.R. 34793, set out as a note under section 4331 of this title, provides for the prevention, control, and abatement of environmental pollution at federal facilities.

Administration of Refuse Act Permit Program. Administration of Refuse Act permit program to regulate discharge of pollutants and other refuse matter into navigable waters of United States or their tributaries, see Ex.Ord.No.11574, Dec. 23, 1970, 35 F.R. 19627, set out as a note under section 407 of Title 33, Navigation and Navigable Waters.

Legislative History. For legislative history and purpose of Pub.L. 91-190, see 1969 U.S.Code Cong. and Adm.News, p. 2751.

REORGANIZATION PLAN NO. 3 OF 1970

Eff. Dec. 2, 1970, 35 F.R. 15623, 84 Stat. 2086.

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, July 9, 1970, pursuant to the provisions of chapter 9 of title 5 of the United States Code [section 901 et seq. of Title 5]

ENVIRONMENTAL PROTECTION AGENCY

Section 1. Establishment of Agency. (a) There is hereby established the Environmental Protection Agency, hereinafter referred to as the "Agency."

(b) There shall be at the head of the Agency the Administrator of the Environmental Protection Agency, hereinafter referred to as the "Administrator." The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall be compensated at the rate now or hereafter provided for Level II of the Executive Schedule Pay Rates (5 U.S.C. 5313 [section 5313 of Title 5]).

(c) There shall be in the Agency a Deputy Administrator of the Environmental Protection Agency who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be compensated at the rate now or hereafter provided for Level III of the Executive Schedule Pay Rates (5 U.S.C. 5314 [section 5314 of Title 5]). The Deputy Administrator shall perform such functions as the Administrator shall from time to time assign or delegate, and shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator.

(d) There shall be in the Agency not to exceed five Assistant Administrators of the Environmental Protection Agency who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be compensated at the rate now or hereafter provided for Level IV of the Executive Schedule Pay Rates (5 U.S.C. 5315 [section 5315 of Title 5]). Each Assistant Administrator shall perform such functions as the Administrator shall from time to time assign or delegate.

Sec. 2. Transfers to Environmental Protection Agency. (a) There are hereby transferred to the Administrator:

(1) All functions vested by law in the Secretary of the Interior and the Department of the Interior which are administered through the Federal Water Quality Administration, all functions which were transferred to the Secretary of the Interior by Reorganization Plan No. 2 of 1966 [set out in the Appendix to Title 5] or

15. Use of off-road vehicles on public lands

In designating as officially open to off-road vehicle use all land not otherwise restricted or closed, Secretary of Department of Interior and other defendants violated express requirements of Ex.Ord.No.11644, § 3(a), set out as a note under this section, requiring that all designations be based upon criteria set forth therein and that criteria be applied to designations of both use and nonuse by off-road vehicles. National Wildlife Federation v. Morton, D.C.D.C.1975, 393 F.Supp. 1290.

Where by designating all otherwise unrestricted land open for use by off-road vehicles the Bureau of Land Management restricted future public participation in designation process to question whether status of specific area or trail should be changed from "open" to "restricted" or closed", adequate opportunity for public participation in designation of areas and trails, as required by Ex.Ord.No.11644, § 3(a), (b), set out as a note under this section, was denied. Id.

16. Procedural or substantive nature of rights created

This chapter creates only procedural and not substantive rights. Morris v. Tennessee Val. Authority, D.C.Ala.1972, 345 F.Supp. 321.

17. Private right of action

Private parties are allowed to enforce this chapter as private attorneys general. Rucker v. Willis, D.C.N.C.1973, 358 F.Supp. 422.

This chapter does not create any substantive private right. Virginians for Dulles v. Volpe, D.C.Va.1972, 344 F.Supp. 573, affirmed in part, reversed in part on other grounds 541 F.2d 442.

This chapter gives rise to no private cause of action against private corporations which allegedly polluted the air. Tanner v. Armco Steel Corp., D.C.Tex. 1972, 340 F.Supp. 532.

SUBCHAPTER I—POLICIES AND GOALS

§ 4331. Congressional declaration of national environmental policy

Creation and maintenance of conditions under which man and nature can exist in productive harmony

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Continuing responsibility of Federal Government to use all practicable means to improve and coordinate Federal plans, functions, programs, and resources

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

Responsibility of each person to contribute to preservation and enhancement of environment

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Pub.L. 91-190, Title I, § 101, Jan. 1, 1970, 83 Stat. 852.

Historical Note

Commission on Population Growth and the American Future. Pub.L. 91-213, §§ 1-9, Mar. 16, 1970, 84 Stat. 67-69, established the Commission on Population Growth and the American Future to conduct and sponsor such studies and research and make such recommendations as might be necessary to provide information and education to all levels of government in the United States, and to our people regarding a broad range of problems associated with population growth and their implications for America's future; prescribed the composition of the Commission; provided for the appointment of its members, and the designation of a Chairman and Vice Chairman; required a majority of the members of the Commission to constitute a quorum, but deems necessary to carry out its f[illegible] allowed a lesser number to conduct hearings; prescribed the compensation of members of the Commission; required the Commission to conduct an inquiry into certain prescribed aspects of population growth in the United States and foreseeable social consequences; provided for the appointment of an Executive Director and other personnel and prescribed their compensation; authorized the Commission to enter into contracts with public agencies, private firms, institutions, and individuals for the conduct of research and surveys, the preparation of reports, and other activities necessary to the discharge of its duties, and to request from any Federal department or agency any information and assistance

4. Judicial conclusions contrary to policy ...
... must avoid conclusions which ... constitute participation in frustration of congressional policy with regard to this chapter. Thompson v. Pugate, D.C.Va.1972, 347 F.Supp. 129.

5. Prevention, etc., of pollution at federal facilities

Executive Order No. 11752, set out as a note under this section, stating policy of federal government to observe applicable standard for prevention, control and abatement of environmental pollution in cooperation with state and local governments, did not authorize blanket exemption of all federal facilities from specified requirements of the states for procurement of permits for operation of equipment causing air pollution. State of Ala. v. Seeley, C.A.Ala.1974, 502 F.2d 1238, vacated on other grounds 96 S.Ct. 2643.

6. Protection of quality of urban life

The environmental policy expressed in this chapter is as broad as the mind can conceive and necessarily includes concern for the quality of urban life; environmental problems of the city are not as readily identifiable as clean air and clean water. Nucleus of Chicago Homeowners Ass'n v. Lynn, C.A.Ill.1973, 324 F.2d 775, certiorari denied 94 S.Ct. 1442, 421 U.S. 987, 47 L.Ed.2d 731.

This chapter must be construed to include protection of quality of life for city residents. First Nat. Bank of Chicago v. Richardson, C.A.Ill.1973, 484 F.2d 1369.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, re-

lutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

Pub.L. 91-190, Title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub.L. 94-83, Aug. 9, 1975, 89 Stat. 424.

So in original.

Historical Note

1975 Amendment. Subpar. (H). Pub.L. 94-83 added subpar. (H). Former subpar. (H) redesignated (I).

Subpars. (E) to (I). Pub.L. 94-83 redesignated former subpars. (D) to (H) as (E) to (I).

Legislative History. For legislative history and purpose of Pub.L. 91-190, see 1970 U.S.Code Cong. and Adm.News, p. 2751. See, also, Pub.L. 94-83, 1975 U.S. Code Cong. and Adm.News, p. 830.

West's Federal Forms

Complaint for injunction for failure to comply, see § 1847.5.
Pre-trial order, see § 2807.12.

Code of Federal Regulations

Environments, standards, etc.,
Agency for International Development, see 22 CFR 216.1 et seq.
Agricultural Stabilization and Conservation Service, see 7 CFR 750.1 et seq.
Bureau of Land Management, see 43 CFR 3040 et seq., 6290.0-2 et seq.
Civil Aeronautics Board, see 14 CFR 201.1 et seq., 203.1 et seq., 312.1 et seq., 399.1 et seq.
Coast Guard, see 46 CFR 10.01-1 et seq., 12.01 et seq., 31.01-1 et seq., 71.01-1 et seq., 91.01-1 et seq., 105.01-1 et seq., 176.01-1 et seq., 187.01-1 et seq., 190.01-1 et seq.
Committee for Purchase from the Blind and Other Severely Handicapped, see 41 CFR 51-4.1 et seq.
Council on Environmental Quality, see 40 CFR 1500.1 et seq., 1510.1 et seq.
Defense Department, see 32 CFR 214.1 et seq.
Energy Research and Development Administration, see 10 CFR 711.1 et seq.
Environmental Protection Agency, see 40 CFR Ch. I.
Federal Aviation Administration, see 14 CFR 21.1 et seq., 36.1 et seq., 91.1 et seq.
Federal Highway Administration, see 23 CFR 420.101 et seq., 712.101 et seq., 751.1 et seq., 770.2[illegible] et seq., 771.1 et seq., 772.1 et seq.
Federal Trade Commission, see 16 CFR 1.1 et seq.
Food and Drug Administration, see 21 CFR 25.1 et seq.
Interstate Commerce Commission, see 49 CFR 1105.1 et seq.
Law Enforcement Assistance Administration, see 28 CFR 19.1 et seq.
National Aeronautics and Space Administration, see 14 CFR 1204.700 et seq.
National Highway Traffic Safety Administration, see 49 CFR 520.1 et seq.
National Marine Fisheries Service, see 50 CFR 251.1 et seq.
Nuclear Regulatory Commission, see 10 CFR 2.1 et seq., 51.1 et seq.
Occupational Safety and Health Administration, see 29 CFR 1960.1 et seq.
Office of Education, see 45 CFR 100a.185, 100b.185.
Soil Conservation Service, see 7 CFR 650.1 et seq.
Tennessee Valley Authority, see 18 CFR 305.1 et seq.
Urban Mass Transportation Administration, see 49 CFR 613.100 et seq.

Note 518

court believed that plaintiffs would prevail in their contention that, even if there was discretion to determine whether environmental statement should be prepared, particular exercise of claimed discretion in determining not to prepare statement was arbitrary and unreasonable, motion for order suspending preliminary injunction against construction was denied. Scherr v. Volpe, D.C.Wis.1971, 336 F.Supp. 896.

§ 4333. Conformity of administrative procedures to national environmental policy

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

Pub.L. 91-190, Title I, § 103, Jan. 1, 1970, 83 Stat. 854.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 91-190, see 1969 U.S.Code Cong. and Adm.News, p. 2751.

Notes of Decisions

General 1
Hearings 2

1. General

Where natural gas company transmitted its application for certification in December of 1969 and Federal Power Commission certificate was issued March 12, 1970, when neither the Federal Power Commission nor the Council on Environmental Quality had promulgated any guidelines, failure of Federal Power Commission to prepare an impact statement as provided in this chapter with respect to expansion of existing natural gas facility did not invalidate issuance of certificate. Transcontinental Gas Pipe Line Corp. v. Hackensack Meadowlands Development Commission, C.A.N.J.1972, 464 F.2d 1288, certiorari denied 93 S.Ct. 908, 409 U.S. 1118, 34 L.Ed.2d 701.

2. Hearings

This chapter does not require extensive administrative proceedings; neither the Administrative Procedure Act, sections 551 et seq. and 701 et seq. of Title 5, nor this chapter compel agency to appoint an examiner and conduct hearings. Natural Resources Defense Council, Inc. v. U. S. Nuclear Regulatory Commission, C.A.2, 1974, 539 F.2d 824.

So long as each final decision in any major federal action, individual or generic, comports with requirements of this chapter and other regulations required by Atomic Energy Act of 1954, section 2201 et seq. of this title, and the Energy Reorganization Act of 1974, section 5841 et seq. of this title, it does not matter that Nuclear Regulatory Commission addresses certain issues in broad-scale inquiry and others in limited individual proceedings. Id.

§ 4334. Other statutory obligations of agencies

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate

consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Pub.L. 91-190, Title I, § 104, Jan. 1, 1970, 83 Stat. 854.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 91-190, see 1969 U.S.Code Cong. and Adm.News, p. 2751.

Notes of Decisions

Generally 2
Construction with other laws 1

Construction with other laws

Compliance to water quality certification under section 1371 of Title 33, is not inconsistent with procedures for the issuance and does not preclude enforcement activities under this chapter, since certifications essentially establish minimum conditions for grant of license, and Atomic Energy Commission can conduct continuing analysis of environmental effect of proposed action despite prior certification. Calvert Cliffs' Coordinating Committee, Inc. v. U. S. Atomic Energy Commission, 1971, 449 F.2d 1109, 149 U.S. App.D.C. 33.

2. Generally

This chapter does not limit authority of any governmental agency in any permanent or conclusive manner, but does mandate that action be taken only in complete awareness on part of actor of environmental consequences of his action and that he first take steps required by this chapter. National Helium Corp. v. Morton, C.A.Kan.1971, 455 F.2d 650.

§ 4335. Efforts supplemental to existing authorizations

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

Pub.L. 91-190, Title I, § 105, Jan. 1, 1970, 83 Stat. 854.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 91-190, see 1969 U.S.Code Cong. and Adm.News, p. 2751.

SUBCHAPTER II—COUNCIL ON ENVIRONMENTAL QUALITY

§ 4341. Reports to Congress; recommendations for legislation

The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban, and rural environment; (2) current and foreseeable

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ture project may do so if upon submission of such program the Administrator determines such program is adequate to carry out the objective of this chapter.

June 30, 1948, c. 758, Title III, § 318, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 877, and amended Dec. 27, 1977, Pub.L. 95-217, § 63, 91 Stat. 1599.

Historical Note

1977 Amendment. Subsec. (a). Pub.L. 95-217 added "pursuant to section 1312 of this title" following "Federal or State supervision".

Subsec. (b). Pub.L. 95-217 struck out ", not later than January 1, 1974," following "The Administrator shall by regulation" in existing provisions and added provisions that the regulations required the application to the discharge of each criterion, factor, procedure, and requirement applicable to a permit issued under section 1342 of this title, as the Administrator determines necessary to carry out the objectives of this chapter.

Subsec. (c). Pub.L. 95-217 added subsec. (c).

Legislative History. For legislative history and purpose of Pub.L. 92-500, see 1972 U.S.Code Cong. and Adm.News, p. 3668. See, also, Pub.L. 95-217, 1977 U.S. Code Cong. and Adm.News, p. 4326.

Code of Federal Regulations

Procedure for discharge, see 40 CFR 115.1 et seq.

SUBCHAPTER IV—PERMITS AND LICENSES

§ 1341. Certification

Compliance with applicable requirements; application; procedures; license suspension

(a)(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reason-

able period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the inter-

state agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

Compliance with other provisions of law setting applicable water quality requirements

(b) Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable ef-

fluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

Authority of Secretary of Army to permit use of spoil disposal areas by Federal licensees or permittees

(c) In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

Limitations and monitoring requirements of certification

(d) Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

June 30, 1948, c. 758, Title IV, § 401, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 877, and amended Dec. 27, 1977, Pub.L. 95-217, §§ 61(b), 64, 91 Stat. 1598, 1599.

Historical Note

1977 Amendment. Subsec. (a). Pub.L. 95-217 added reference to section 1313 of this title in pars. (1), (3), (4), and (5), struck out par. (6) which had provided that an Federal agency be deemed an applicant for the purposes of this subsection, and redesignated former par. (7) as (6).

Administration of Refuse Act Permit Program. Administration of Refuse Act Permit Program to regulate discharge of pollutants and other refuse matter into navigable waters of the United States or their tributaries, see Ex.Ord. No. 11574, Dec. 23, 1970, 35 F.R. 19627, set out as a note under section 407 of this title.

Legislative History. For legislative history and purpose of Pub.L. 92-500, see 1972 U.S.Code Cong. and Adm.News, p. 3668. See, also, Pub.L. 95-217, 1977 U.S. Code Cong. and Adm.News, p. 4326.

Library References

Navigable Waters ⇨33. C.J.S. Navigable Waters § 11.

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Sec.

GAME, FUR-BEARING ANIMALS AND FISH

§ 661. Declaration of purpose; cooperation of agencies; surveys and investigations; donations

For the purpose of recognizing the vital contribution of our wildlife resources to the Nation, the increasing public interest and significance thereof due to expansion of our national economy and other factors, and to provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs through the effectual and harmonious planning, development, maintenance, and coordination of wildlife conservation and rehabilitation for the purposes of sections 661 to 666c of this title in the United States, its Territories and possessions, the Secretary of the Interior is authorized (1) to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat, in controlling losses of the same from disease or other causes, in minimizing damages from overabundant species, in providing public shooting and fishing areas, including easements across public lands for access thereto, and in carrying out other measures necessary to effectuate the purposes of said sections; (2) to make surveys and investigations of the wildlife of the public domain, including lands and waters or interests therein acquired or controlled by any agency of the United States; and (3) to accept donations of land and contributions of funds in furtherance of the purposes of said sections.

Mar. 10, 1934, c. 55, § 1, 48 Stat. 401; 1939 Reorg.Plan No. II, § 4(e), (f), eff. July 1, 1939, 4 F.R. 2731, 53 Stat. 1433; Aug. 14, 1946, c. 965, 60 Stat. 1080; Aug. 12, 1958, Pub.L. 85-624, § 2, 72 Stat. 563.

Historical Note

1958 Amendment. Pub.L. 85-624 inserted provisions which relate to recognition of the vital contribution of wildlife resources to the Nation, the increasing public interest and significance thereof, and to equal consideration and coordination of wildlife conservation with other water-resource development programs, and which authorize the Secretary to provide public fishing areas, and to ac-

mend measures for (1) arresting depletion in productive beds; (2) restoring to production beds formerly productive; (3) developing new areas; (4) improving methods of digging, transplanting, and handling; and (5) otherwise increasing production and improving quality for benefit of both producers and consumers, and, authorized appropriation for the five year period beginning July 1, 1948, of $250,000 to carry out the studies of the soft shell clam and the sum of $250,000 to carry out the studies of the hard shell clam.

Administration of Refuse Act Permit Program. Administration of Refuse Act permit program to regulate discharge of pollutants and other refuse matter into navigable waters of United States or their tributaries, see Ex.Ord.No.11574, Dec. 23, 1970, 35 F.R. 19627, set out as a note under section 407 of Title 33, Navigation and Navigable Waters.

Library References

Fish ⇐24.
Game ⇐3½.

C.J.S. Fish § 26.
C.J.S. Game § 7.

Code of Federal Regulations

Nondiscrimination in federally assisted programs, see 43 CFR 17.1 et seq. and Appendixes.

§ 662. Impounding, diverting, or controlling of waters—Consultations between agencies

(a) Except as hereafter stated in subsection (h) of this section, whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development.

Reports and recommendations; consideration

(b) In furtherance of such purposes, the reports and recommendations of the Secretary of the Interior on the wildlife aspects of such projects, and any report of the head of the State agency exercising administration over the wildlife resources of the State, based on surveys and investigations conducted by the United States Fish and Wildlife Service and such State agency for the purpose of determining the possible damage to wildlife resources and for the purpose of determining means and measures that should be adopted to prevent the loss of or damage to such wildlife resources, as well as to provide concurrently for the development and improvement of such resources, shall be made an integral part of any report prepared or submitted by any agency of

the Federal Government responsible for engineering surveys and construction of such projects when such reports are presented to the Congress or to any agency or person having the authority or the power, by administrative action or otherwise, (1) to authorize the construction of water-resource development projects or (2) to approve a report on the modification or supplementation of plans for previously authorized projects, to which sections 661 to 666c of this title apply. Recommendations of the Secretary of the Interior shall be as specific as is practicable with respect to features recommended for wildlife conservation and development, lands to be utilized or acquired for such purposes, the results expected, and shall describe the damage to wildlife attributable to the project and the measures proposed for mitigating or compensating for these damages. The reporting officers in project reports of the Federal agencies shall give full consideration to the report and recommendations of the Secretary of the Interior and to any report of the State agency on the wildlife aspects of such projects, and the project plan shall include such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits.

Modification of projects; acquisition of lands

(c) Federal agencies authorized to construct or operate water-control projects are authorized to modify or add to the structures and operations of such projects, the construction of which has not been substantially completed on the date of enactment of the Fish and Wildlife Coordination Act, and to acquire lands in accordance with section 663 of this title, in order to accommodate the means and measures for such conservation of wildlife resources as an integral part of such projects: *Provided*, That for projects authorized by a specific Act of Congress before the date of enactment of the Fish and Wildlife Coordination Act (1) such modification or land acquisition shall be compatible with the purposes for which the project was authorized; (2) the cost of such modifications or land acquisition, as means and measures to prevent loss of and damage to wildlife resources to the extent justifiable, shall be an integral part of the cost of such projects; and (3) the cost of such modifications or land acquisition for the development or improvement of wildlife resources may be included to the extent justifiable, and an appropriate share of the cost of any project may be allocated for this purpose with a finding as to the part of such allocated cost, if any, to be reimbursed by non-Federal interests.

Project costs

(d) The cost of planning for and the construction or installation and maintenance of such means and measures adopted to carry out the conservation purposes of this section shall constitute an integral part of the cost of such projects: *Provided*, That such cost attributable to the development and improvement of wildlife shall not extend beyond that necessary for (1) land acquisition, (2) facilities as specifically

recommended in water resource project reports, (3) modification of the project, and (4) modification of project operations, but shall not include the operation of wildlife facilities.

Transfer of funds

(e) In the case of construction by a Federal agency, that agency is authorized to transfer to the United States Fish and Wildlife Service, out of appropriations or other funds made available for investigations, engineering, or construction, such funds as may be necessary to conduct all or part of the investigations required to carry out the purposes of this section.

Estimation of wildlife benefits or losses

(f) In addition to other requirements, there shall be included in any report submitted to Congress supporting a recommendation for authorization of any new project for the control or use of water as described herein (including any new division of such project or new supplemental works on such project) an estimation of the wildlife benefits or losses to be derived therefrom including benefits to be derived from measures recommended specifically for the development and improvement of wildlife resources, the cost of providing wildlife benefits (including the cost of additional facilities to be installed or lands to be acquired specifically for that particular phase of wildlife conservation relating to the development and improvement of wildlife), the part of the cost of joint-use facilities allocated to wildlife, and the part of such costs, if any, to be reimbursed by non-Federal interests.

Applicability to projects

(g) The provisions of this section shall be applicable with respect to any project for the control or use of water as prescribed herein, or any unit of such project authorized before or after the date of enactment of the Fish and Wildlife Coordination Act for planning or construction, but shall not be applicable to any project or unit thereof authorized before the date of enactment of the Fish and Wildlife Coordination Act if the construction of the particular project or unit thereof has been substantially completed. A project or unit thereof shall be considered to be substantially completed when sixty percent or more of the estimated construction cost has been obligated for expenditure.

Exempt projects and activities

(h) The provisions of sections 661 to 666c of this title shall not be applicable to those projects for the impoundment of water where the maximum surface area of such impoundments is less than ten acres, nor to activities for or in connection with programs primarily for land management and use carried out by Federal agencies with respect to Federal lands under their jurisdiction.

Mar. 10, 1934, c. 55, § 2, 48 Stat. 401; 1939 Reorg.Plan No. II, § 4(e), (f), eff. July 1, 1939, 4 F.R. 2731, 53 Stat. 1433; Aug. 14, 1946,

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Great Lakes Water Quality Agreement of 1978

Agreement, with annexes
and terms of reference,
between the
United States of America and Canada
signed at Ottawa
November 22, 1978

International Joint Commission
Canada and the United States

GREAT LAKES WATER QUALITY AGREEMENT OF 1978

AGREEMENT BETWEEN CANADA AND THE UNITED STATES OF AMERICA ON GREAT LAKES WATER QUALITY, 1978

The Government of Canada and the Government of the United States of America,

Having in 1972 entered into an Agreement on Great Lakes Water Quality;

Reaffirming their determination to restore and enhance water quality in the Great Lakes System;

Continuing to be concerned about the impairment of water quality on each side of the boundary to an extent that is causing injury to health and property on the other side, as described by the International Joint Commission;

Reaffirming their intent to prevent further pollution of the Great Lakes Basin Ecosystem owing to continuing population growth, resource development and increasing use of water;

Reaffirming in a spirit of friendship and cooperation the rights and obligations of both countries under the Boundary Waters Treaty, signed on January 11, 1909, and in particular their obligation not to pollute boundary waters;

Continuing to recognize the rights of each country in the use of its Great Lakes waters;

Having decided that the Great Lakes Water Quality Agreement of April 15, 1972 and subsequent reports of the International Joint Commission provide a sound basis for new and more effective cooperative actions to restore and enhance water quality in the Great Lakes Basin Ecosystem;

Recognizing that restoration and enhancement of the boundary waters can not be achieved independently of other parts of the Great Lakes Basin Ecosystem with which these waters interact;

Concluding that the best means to preserve the aquatic ecosystem and achieve improved water quality throughout the Great Lakes System is by adopting common objectives, developing and implementing cooperative programs and other measures, and

assigning special responsibilities and functions to the International Joint Commission:

Have agreed as follows:

ARTICLE I

DEFINITIONS

As used in this Agreement:

(a) "Agreement" means the present Agreement as distinguished from the Great Lakes Water Quality Agreement of April 15, 1972;

(b) "Annex" means any of the Annexes to this Agreement, each of which is attached to and forms an integral part of this Agreement;

(c) "Boundary waters of the Great Lakes System" or "boundary waters" means boundary waters, as defined in the Boundary Waters Treaty, that are within the Great Lakes System;

(d) "Boundary Waters Treaty" means the Treaty between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada, signed at Washington on January 11, 1909;

(e) "Compatible regulations" mean regulations no less restrictive than the agreed principles set out in this Agreement;

(f) "General Objectives" are broad descriptions of water quality conditions consistent with the protection of the beneficial uses and the level of environmental quality which the Parties desire to secure and which will provide overall water management guidance;

(g) "Great Lakes Basin Ecosystem" means the interacting components of air, land, water and living organisms, including man, within the drainage basin of the St. Lawrence River at or upstream from the point at which this river becomes the international boundary between Canada and the United States;

(h) "Great Lakes System" means all of the streams, rivers, lakes and other bodies of water that are within the drainage basin on the St. Lawrence River at or upstream from the point at which this river becomes the international boundary between Canada and the United States;

(i) "Harmful quantity" means any quantity of a substance that if discharged into receiving water would be inconsistent with the achievement of the General and Specific Objectives;

(j) "Hazardous polluting substance" means any element or compound identified by the Parties which, if discharged in any quantity into or upon receiving waters or adjoining shorelines, would present an imminent and substantial danger to public health or welfare; for this purpose, "public health or welfare" encompasses all factors affecting the health and welfare of man including but not limited to human health, and the conservation and protection of flora and fauna, public and private property, shorelines and beaches;

(k) "International Joint Commission" or "Commission" means the International Joint Commission established by the Boundary Waters Treaty;

(l) "Monitoring" means a scientifically designed system of continuing standardized measurements and observations and the evaluation thereof;

(m) "Objectives" means the General Objectives adopted pursuant to Article III and the Specific Objectives adopted pursuant to Article IV of this Agreement;

(n) "Parties" means the Government of Canada and the Government of the United States of America;

(o) "Phosphorus" means the element phosphorus present as a constituent of various organic and inorganic complexes and compounds;

(p) "Research" means development, demonstration and other research activities but does not include monitoring and surveillance of water or air quality;

(q) "Science Advisory Board" means the Great Lakes Science Advisory Board of the International Joint Commission established pursuant to Article VIII of this Agreement;

(r) "Specific Objectives" means the concentration or quantity of a substance or level of effect that the Parties agree, after investigation, to recognize as a maximum or minimum desired limit for a defined body of water or portion thereof, taking into account the beneficial uses or level of environmental quality which the Parties desire to secure and protect;

(s) "State and Provincial Governments" means the Governments of the States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Wisconsin and the Commonwealth of Pennsylvania, and the Government of the Province of Ontario;

(t) "Surveillance" means specific observations and measurements relative to control or management;

(u) "Terms of Reference" means the Terms of Reference for the Joint Institutions and the Great Lakes Regional Office established pursuant to this Agreement, which are attached to and form an integral part of this Agreement;

(v) "Toxic substance" means a substance which can cause death, disease, behavioural abnormalities, cancer, genetic mutations, physiological or reproductive malfunctions or physical deformities in any organism or its offspring, or which can become poisonous after concentration in the food chain or in combination with other substances;

(w) "Tributary waters of the Great Lakes System" or "tributary waters" means all the waters within the Great Lakes System that are not boundary waters;

(x) "Water Quality Board" means the Great Lakes Water Quality Board of the International Joint Commission established pursuant to Article VIII of this Agreement.

ARTICLE II

PURPOSE

The purpose of the Parties is to restore and maintain the chemical, physical, and biological integrity of the waters of the Great Lakes Basin Ecosystem. In order to achieve this purpose the Parties agree to make a maximum effort to develop programs, practices and technology necessary for a better understanding of the Great Lakes Basin Ecosystem and to eliminate or reduce to the maximum extent practicable the discharge of pollutants into the Great Lakes System.

Consistent with the provisions of this Agreement, it is the policy of the Parties that:

(a) The discharge of toxic substances in toxic amounts be prohibited and the discharge of any or all persistent toxic substances be virtually eliminated;

(b) Financial assistance to construct publicly owned waste treatment works be provided by a combination of local, state, provincial, and federal participation; and

(c) Coordinated planning processes and best management practices be developed and implemented by the respective jurisdictions to ensure adequate control of all sources of pollutants.

ARTICLE III

GENERAL OBJECTIVES

The Parties adopt the following General Objectives for the Great Lakes System. These waters should be:

(a) Free from substances that directly or indirectly enter the waters as a result of human activity and that will settle to form putrescent or otherwise objectionable sludge deposits, or that will adversely affect aquatic life or waterfowl;

(b) Free from floating materials such as debris, oil, scum, and other immiscible substances resulting from human activities in amounts that are unsightly or deleterious;

(c) Free from materials and heat directly or indirectly entering the water as a result of human activity that alone, or in combination with other materials, will produce colour, odour, taste, or other conditions in such a degree as to interfere with beneficial uses;

(d) Free from materials and heat directly or indirectly entering the water as a result of human activity that alone, or in combination with other materials, will produce conditions that are toxic or harmful to human, animal, or aquatic life; and

(e) Free from nutrients directly or indirectly entering the waters as a result of human activity in amounts that create growths of aquatic life that interfere with beneficial uses.

ARTICLE IV

SPECIFIC OBJECTIVES

1. The Parties adopt the Specific Objectives for the boundary waters of the Great Lakes System as set forth in Annex 1, subject to the following:

(a) The Specific Objectives adopted pursuant to this Article represent the minimum levels of water quality desired in the boundary waters of the Great Lakes System and are not intended to preclude the establishment of more stringent requirements.

(b) The determination of the achievement of Specific Objectives shall be based on statistically valid sampling data.

(c) Notwithstanding the adoption of Specific Objectives, all reasonable and practicable measures shall be taken to maintain or improve the existing water quality in those areas of the boundary waters of the Great Lakes System where such water quality is better than that prescribed by the Specific Objectives, and in those areas having outstanding natural resource value.

(d) The responsible regulatory agencies shall not consider flow augmentation as a substitute for adequate treatment to meet the Specific Objectives.

(e) The Parties recognize that in certain areas of boundary waters natural phenomena exist which, despite the best efforts of the Parties, will prevent the achievement of some of the Specific Objectives. As early as possible, these areas should be identified explicitly by the appropriate jurisdictions and reported to the International Joint Commission.

(f) Limited use zones in the vicinity of present and future municipal, industrial and tributary point source discharges shall be designated by the responsible regulatory agencies within which some of the Specific Objectives may not apply. Establishment of these zones shall not be considered a substitute for adequate treatment or control of discharges at their source. The size shall be minimized to the greatest possible degree, being no larger than that attainable by all reasonable and practicable effluent treatment measures. The boundary of a limited use zone shall not transect the international boundary. Principles for the designation of limited use zones are set out in Annex 2.

2. The Specific Objectives for the boundary waters of the Great Lakes System or for particular portions thereof shall be kept under review by the Parties and by the International Joint Commission, which shall make appropriate recommendations.

3. The Parties shall consult on:

(a) The establishment of Specific Objectives to protect beneficial uses from the combined effects of pollutants; and

(b) The control of pollutant loading rates for each lake basin to protect the integrity of the ecosystem over the long term.

ARTICLE V

STANDARDS OTHER REGULATORY REQUIREMENTS, AND RESEARCH

1. Water quality standards and other regulatory requirements of the Parties shall be consistent with the achievement of the General and Specific Objectives. The Parties shall use their best efforts to ensure that water quality standards and other regulatory requirements of the State and Provincial Governments shall similarly be consistent with the achievement of these Objectives. Flow augmentation shall not be considered as a substitute for adequate treatment to meet water quality standards or other regulatory requirements.

2. The Parties shall use their best efforts to ensure that:

(a) The principal research funding agencies in both countries orient the research programs of their organizations in response to research priorities identified by the Science Advisory Board and recommended by the Commission; and

(b) Mechanisms be developed for appropriate cost-effective international cooperation.

ARTICLE VI

PROGRAMS AND OTHER MEASURES

1. The Parties shall continue to develop and implement programs and other measures to fulfil the purpose of this Agreement and to meet the General and Specific Objectives. Where present treatment is inadequate to meet the General and Specific Objectives, additional treatment shall be required. The programs and measures shall include the following:

(a) Pollution from Municipal Sources. Programs for the abatement, control and prevention of municipal discharges and urban drainage into the Great Lakes System. These programs shall be completed and in operation as soon as practicable, and in the case of municipal sewage treatment facilities no later than December 31, 1982. These programs shall include:

(i) Construction and operation of waste treatment facilities in all municipalities having sewer systems to provide levels of treatment consistent with the achievement of phosphorus requirements and the General and Specific Objectives, taking into account the effects of waste from other sources;

(ii) Provision of financial resources to ensure prompt construction of needed facilities;

(iii) Establishment of requirements for construction and operating standards for facilities;

(iv) Establishment of pre-treatment requirements for all industrial plants discharging waste into publicly owned treatment works where such industrial wastes are not amenable to adequate treatment or removal using conventional municipal treatment processes;

(v) Development and implementation of practical programs for reducing pollution from [illegible]

(vi) Establishment of effective enforcement programs to ensure that the above pollution abatement requirements are fully met.

(b) Pollution from Industrial Sources. Programs for the abatement, control and prevention of pollution from industrial sources entering the Great Lakes System. These programs shall be completed and in operation as soon as practicable and in any case no later than December 31, 1983, and shall include:

(i) Establishment of waste treatment or control requirements expressed as effluent limitations (concentrations and/or loading limits for specific pollutants where possible) for all industrial plants, including power generating facilities, to provide levels of treatment or reduction or elimination of inputs of substances and effects consistent with the achievement of the General and Specific Objectives and other control requirements, taking into account the effects of waste from other sources;

(ii) Requirements for the substantial elimination of discharges into the Great Lakes System of persistent toxic substances;

(iii) Requirements for the control of thermal discharges;

(iv) Measures to control the discharge of radioactive materials into the Great Lakes System;

(v) Requirements to minimize adverse environmental impacts of water intakes;

(vi) Development and implementation of programs to meet industrial pre-treatment requirements as specified under sub-paragraph (a) (iv) above; and

(vii) Establishment of effective enforcement programs to ensure the above pollution abatement requirements are fully met.

(c) Inventory of Pollution Abatement Requirements. Preparation of an inventory of pollution abatement requirements for all municipal and industrial facilities discharging into the Great Lakes System in order to gauge progress toward the earliest practicable completion and operation of the programs listed in sub-paragraphs (a) and (b) above. This inventory, prepared and revised annually, shall include compliance schedules and status of compliance with monitoring and effluent restrictions, and shall be made available to the International Joint Commission and to the public. In the initial preparation of this inventory, priority shall be given to the problem areas previously identified by the Water Quality Board.

(d) Eutrophication. Programs and measures for the reduction and control of inputs of phosphorus and other nutrients, in accordance with the provisions of Annex 3.

(e) Pollution from Agriculture, Forestry and Other Land Use Activities. Measures for the abatement and control of pollution from agricultural, forestry and other land

(i) Measures for the control of pest control products used in the Great Lakes Basin to ensure that pest control products likely to have long-term deleterious effects on the quality of water or its biota be used only as authorized by the responsible regulatory agencies; that inventories of pest control products used in the Great Lakes Basin be established and maintained by appropriate agencies; and that research and educational programs be strengthened to facilitate integration of cultural, biological and chemical pest control techniques;

(ii) Measures for the abatement and control of pollution from animal husbandry operations, including encouragement to appropriate agencies to adopt policies and regulations regarding utilization of animal wastes, and site selection and disposal of liquid and solid wastes, and to strengthen educational and technical assistance programs to enable farmers to establish waste utilization, handling and disposal systems;

(iii) Measures governing the handling and disposal of liquid and solid wastes, including encouragement to appropriate regulatory agencies to ensure proper location, design, and regulation governing land disposal, and to ensure sufficient, adequately trained technical and administrative capability to review plans and to supervise and monitor systems for application of wastes on land;

(iv) Measures to review and supervise road salting practices and salt storage to ensure optimum use of salt and all-weather protection of salt stores in consideration of long-term environmental impact;

(v) Measures to control soil losses from urban and suburban as well as rural areas;

(vi) Measures to encourage and facilitate improvements in land use planning and management programs to take account of impacts on Great Lakes water quality;

(vii) Other advisory programs and measures to abate and control inputs of nutrients, toxic substances and sediments from agricultural, forestry and other land use activities; and

(viii) Consideration of future recommendations from the International Joint Commission based on the Pollution from Land Use Activities Reference.

(f) Pollution from Shipping Activities. Measures for the abatement and control of pollution from shipping sources, including:

(i) Programs and compatible regulations to prevent discharges of harmful quantities of oil and hazardous polluting substances, in accordance with Annex 4;

(ii) Such compatible regulations to abate and control pollution from shipping sources as may be deemed desirable in the light of continuing reviews and studies to be undertaken in accordance with Annex 6;

(iv) Programs and any necessary compatible regulations in accordance with Annexes 4 and 5, for the safe and efficient handling of shipboard generated wastes, including oil, hazardous polluting substances, garbage, waste water and sewage, and for their subsequent disposal, including the type and quantity of reception facilities and, if applicable, treatment standards; and

(v) Establishment by the Canadian Coast Guard and the United States Coast Guard of a coordinated system for aerial and surface surveillance for the purpose of enforcement of regulations and the early identification, abatement and clean-up of spills of oil, hazardous polluting substances, or other pollution.

(g) Pollution from Dredging Activities. Measures for the abatement and control of pollution from all dredging activities, including the development of criteria for the identification of polluted sediments and compatible programs for disposal of polluted dredged materials, in accordance with Annex 7. Pending the development of compatible criteria and programs, dredging operations shall be conducted in a manner that will minimize adverse effects on the environment.

(h) Pollution from Onshore and Offshore Facilities. Measures for the abatement and control of pollution from onshore and offshore facilities, including programs and compatible regulations for the prevention of discharges of harmful quantities of oil and hazardous polluting substances, in accordance with Annex 8.

(i) Contingency Plan. Maintenance of a joint contingency plan for use in the event of a discharge or the imminent threat of a discharge of oil or hazardous polluting substances, in accordance with Annex 9.

(j) Hazardous Polluting Substances. Implementation of Annex 10 concerning hazardous polluting substances. The Parties shall further consult from time to time for the purpose of revising the list of hazardous polluting substances and of identifying harmful quantities of these substances.

(k) Persistent Toxic Substances. Measures for the control of inputs of persistent toxic substances including control programs for their production, use, distribution and disposal, in accordance with Annex 12.

(l) Airborne Pollutants. Programs to identify pollutant sources and relative source contributions, including the more accurate definition of wet and dry deposition rates, for those substances which may have significant adverse effects on environmental quality including the

indirect effects of impairment of tributary water quality through atmospheric deposition in drainage basins. In cases where significant contributions to Great Lakes pollution from atmospheric sources are identified, the Parties agree to consult on appropriate remedial programs.

(e) Surveillance and Monitoring. Implementation of a coordinated surveillance and monitoring program in the Great Lakes System, in accordance with Annex 11, to assess compliance with pollution control requirements and achievement of the Objectives, to provide information for measuring local and whole lake response to control measures, and to identify emerging problems.

3. The Parties shall develop and implement such additional programs as they jointly decide are necessary and desirable to fulfil the purpose of this Agreement and to meet the General and Specific Objectives.

ARTICLE VII

POWERS, RESPONSIBILITIES AND FUNCTIONS OF THE INTERNATIONAL JOINT COMMISSION

1. The International Joint Commission shall assist in the implementation of this Agreement. Accordingly, the Commission is hereby given, by a Reference pursuant to Article IX of the Boundary Waters Treaty, the following responsibilities:

(a) Collation, analysis and dissemination of data and information supplied by the Parties and State and Provincial Governments relating to the quality of the boundary waters of the Great Lakes System and to pollution that enters the boundary waters from tributary waters and other sources;

(b Collection, analysis and dissemination of data and information concerning the General and Specific Objectives and the operation and effectiveness of the programs and other measures established pursuant to this Agreement;

(c) Tendering of advice and recommendations to the Parties and to the State and Provincial Governments on problems of and matters related to the quality of the boundary waters of the Great Lakes System including specific recommendations concerning the General and Specific Objectives, legislation, standards and other regulatory requirements, programs and other measures, and intergovernmental agreements relating to the quality of these waters;

(d) Tendering of advice and recommendations to the Parties in connection with matters covered under the Annexes to this Agreement;

(e) Provision of assistance in the coordination of the joint activities envisaged by this Agreement;

(f) Provision of assistance in and advice on matters related to research in the Great Lakes Basin Ecosystem, including identification of objectives for research activities, tendering of advice and recommendations concerning research to the Parties and to the State and Provincial Governments, and dissemination of information concerning research to interested persons and agencies;

(g) Investigations of such subjects related to the Great Lakes Basin Ecosystem as the Parties may from time to time refer to it.

2. In the discharge of its responsibilities under this Reference, the Commission may exercise all of the powers conferred upon it by the Boundary Waters Treaty and by any legislation passed pursuant thereto including the power to conduct public hearings and to compel the testimony of witnesses and the production of documents.

3. The Commission shall make a full report to the Parties and to the State and Provincial Governments no less frequently than biennially concerning progress toward the achievement of the General and Specific Objectives including, as appropriate, matters related to Annexes to this Agreement. This report shall include an assessment of the effectiveness of the programs and other measures undertaken pursuant to this Agreement, and advice and recommendations. In alternate years the Commission may submit a summary report. The Commission may at any time make special reports to the Parties, to the State and Provincial Governments and to the public concerning any problem of water quality in the Great Lakes System.

4. The Commission may in its discretion publish any report, statement or other document prepared by it in the discharge of its functions under this Reference.

5. The Commission shall have authority to verify independently the data and other information submitted by the Parties and by the State and Provincial Governments through such tests or other means as appear appropriate to it, consistent with the Boundary Waters Treaty and with applicable legislation.

6. The Commission shall carry out its responsibilities under this Reference utilizing principally the services of the Water Quality Board and the Science Advisory Board established under Article VIII of this Agreement. The Commission shall also ensure liaison and coordination between the institutions established under this Agreement and other institutions which may address concerns relevant to the Great Lakes Basin Ecosystem, including both those within its purview, such as those Boards related to Great Lakes levels and air pollution matters, and other international bodies, as appropriate.

ARTICLE VIII

JOINT INSTITUTIONS AND REGIONAL OFFICE

1. To assist the International Joint Commission in the exercise of the powers and responsibilities assigned to it under this Agreement, there shall be two Boards:

(a) A Great Lakes Water Quality Board which shall be the principal advisor to the Commission. The Board shall be composed of an equal number of members from Canada and the United States, including representatives from the Parties and each of the State and Provincial Governments; and

(b) A Great Lakes Science Advisory Board which shall provide advice on research to the Commission and to the Water Quality Board. The Board shall further provide advice on scientific matters referred to it by the Commission, or by the Water Quality Board in consultation with the Commission. The Science Advisory

Board shall consist of managers of Great Lakes research programs and recognized experts on Great Lakes water quality problems and related fields.

3. The members of the Water Quality Board and the Science Advisory Board shall be appointed by the Commission after consultation with the appropriate government or governments concerned. The functions of the Boards shall be as specified in the Terms of Reference appended to this Agreement.

3. To provide administrative support and technical assistance to the two Boards, and to provide a public information service for the programs, including public hearings, undertaken by the International Joint Commission and by the Boards, there shall be a Great Lakes Regional Office of the International Joint Commission. Specific duties and organization of the Office shall be as specified in the Terms of Reference appended to this Agreement.

4. The Commission shall submit an annual budget of anticipated expenses to be incurred in carrying out its responsibilities under this Agreement to the Parties for approval. Each Party shall seek funds to pay one-half of the annual budget as approved, but neither Party shall be under an obligation to pay a larger amount than the other toward this budget.

ARTICLE IX

SUBMISSION AND EXCHANGE OF INFORMATION

1. The International Joint Commission shall be given at its request any data or other information relating to water quality in the Great Lakes System in accordance with procedures established by the Commission.

2. The Commission shall make available to the Parties and to the State and Provincial Governments upon request all data or other information furnished to it in accordance with this Article.

3. Each Party shall make available to the other at its request any data or other information in its control relating to water quality in the Great Lakes System.

4. Notwithstanding any other provision of this Agreement, the Commission shall not release without the consent of the owner any information identified as proprietary information under the law of the place where such information has been acquired.

ARTICLE X

CONSULTATION AND REVIEW

1. Following the receipt of each report submitted to the Parties by the International Joint Commission in accordance with paragraph 3 of Article VII of this Agreement, the Parties shall consult on the recommendations contained in such report and shall consider such action as may be appropriate, including:

(a) The modification of existing Objectives and the adoption of new Objectives;

(c) The amendment of this Agreement or any Annex thereto.

Additional consultations may be held at the request of either Party on any matter arising out of the implementation of this Agreement.

2. When a Party becomes aware of a special pollution problem that is of urgent concern and requires an immediate response, it shall notify and consult the other Party forthwith about appropriate remedial action.

3. The Parties shall conduct a comprehensive review of the operation and effectiveness of this Agreement following the third biennial report [illegible] commission required under Article VII of this Agreement.

ARTICLE XI

IMPLEMENTATION

1. The obligations undertaken in this Agreement shall be subject to the appropriation of funds in accordance with the constitutional processes of the Parties.

2. The Parties commit themselves to seek:

(a) The appropriation of the funds required to implement this Agreement, including the funds needed to develop and implement the programs and other measures provided for in Article VI of this Agreement, and the funds required by the International Joint Commission to carry out its responsibilities effectively;

(b) The enactment of any additional legislation that may be necessary in order to implement the programs and other measures provided for in Article VI of this Agreement; and

(c) The cooperation of the State and Provincial Governments in all matters relating to this Agreement.

ARTICLE XII

EXISTING RIGHTS AND OBLIGATIONS

Nothing in this Agreement shall be deemed to diminish the rights and obligations of the Parties as set forth in the Boundary Waters Treaty.

ARTICLE XIII

AMENDMENT

1. This Agreement, the Annexes, and the Terms of Reference may be amended by agreement of the Parties. The Annexes may also be amended as provided therein, subject to the requirement that such amendments shall be within the scope of this Agreement. All such amendments to the Annexes shall be confirmed by an exchange of notes or letters between the Parties through diplomatic channels which shall specify the effective date or dates of such

2. All amendments to this Agreement, the Annexes, and the Terms of Reference shall be communicated promptly to the International Joint Commission.

ARTICLE XIV

ENTRY INTO FORCE AND TERMINATION

This Agreement shall enter into force upon signature by the duly authorized representatives of the Parties, and shall remain in force for a period of five years and thereafter until terminated upon twelve months' notice given in writing by one of the Parties to the other.

ARTICLE XV

SUPERSESSION

This Agreement supersedes the Great Lakes Water Quality Agreement of April 15, 1972, and shall be referred to as the "Great Lakes Water Quality Agreement of 1978".

IN WITNESS WHEREOF the undersigned representatives, duly authorized by their respective Governments, have signed this Agreement.

DONE in duplicate at Ottawa in the English and French languages, both versions being equally authentic, this 22nd day of November 1978.

EN FOI DE QUOI, les représentants soussignés, dûment authorisés par leur Gouvernement respectif, ont signé le présent Accord.

FAIT en double exemplaire à Ottawa en français et en anglais, chaque version faisant également foi, ce 22ème jour de novembre 1978.

For the Government of Canada
Pour le Gouvernement du Canada

For the Government of the United States of America
Pour le Gouvernement des Etats-Unis d'Amérique

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ANNEX 1

SPECIFIC OBJECTIVES/

These Objectives are based on available information on cause/effect relationships between pollutants and receptors to protect the recognized most sensitive use in all waters. These Objectives may be amended, or new Objectives may be added, by mutual consent of the Parties.

1. CHEMICAL

A. Persistent Toxic Substances

1. Organic

(a) Pesticides

Aldrin/Dieldrin

The sum of the concentrations of aldrin and dieldrin in water should not exceed 0.001 microgram per litre. The sum of concentrations of aldrin and dieldrin in the edible portion of fish should not exceed 0.1 microgram per gram (wet weight basis) for the protection of human consumers of fish.

Chlordane

The concentration of chlordane in water should not exceed 0.04 microgram per litre for the protection of aquatic life.

DDT and Metabolites

The sum of the concentrations of DDT and its metabolites in water should not exceed 0.001 microgram per litre. The sum of the concentrations of DDT and its metabolites in whole fish should not exceed 1.0 microgram per gram (wet weight basis) for the protection of fish-consuming aquatic birds.

Endrin

The concentration of endrin in water should not exceed 0.002 microgram per litre. The concentration of endrin in the edible portion of fish should not exceed 0.1 microgram per gram (wet weight basis) for the protection of human consumers of fish.

Heptachlor/Heptachlor Epoxide

The sum of the concentrations of heptachlor and heptachlor epoxide in water should not exceed 0.001 microgram per litre. The sum of the concentrations of heptachlor and heptachlor epoxide in edible portions of fish should not exceed 0.1 microgram per gram (wet weight basis) for the protection of human consumers of fish.

Lindane

The concentration of lindane in water should not exceed 0.01 microgram per litre for the protection of aquatic life. The concentration of lindane in edible portions of fish should not exceed 0.3 microgram per gram (wet weight basis) for the protection of human consumers of fish.

Methoxychlor

The concentration of methoxychlor in water should not exceed 0.04 microgram per litre for the protection of aquatic life.

Mirex

For the protection of aquatic organisms and fish-consuming birds and animals, mirex and its degradation products should be substantially absent from water and aquatic organisms. Substantially absent here means less than detection levels as determined by the best scientific methodology available.

Toxaphene

The concentration of toxaphene in water should not exceed 0.005 microgram per litre for the protection of aquatic life.

(b) Other Compounds

Phthalic Acid Esters

The concentration of dibutyl phthalate and di(2-ethylhexyl) phthalate in water should not exceed 4.0 micrograms per litre and 0.4 microgram per litre, respectively, for the protection of aquatic life. Other phthalic acid esters should not exceed 0.2 microgram per litre in waters for the protection of aquatic life.

Polychlorinated Biphenyls (PCBs)

The concentration of total polychlorinated biphenyls in fish tissues (whole fish, calculated on a wet weight basis), should not exceed 0.1 microgram per gram for the protection of birds and animals which consume fish.

Unspecified Organic Compounds

For other organic contaminants, for which specific objectives have not been defined, but which can be demonstrated to be persistent and are likely to be toxic, the concentrations of such compounds in water or aquatic organisms should be substantially absent, i.e., less than detection levels as determined by the best scientific methodology available.

2. Inorganic

(a) Metals

Arsenic

The concentrations of total arsenic in an unfiltered water sample should not exceed 50 micrograms per litre to protect raw waters for public water supplies.

Cadmium

The concentration of total cadmium in an unfiltered water sample should not exceed 0.2 microgram per litre to protect aquatic life.

Chromium

The concentration of total chromium in an unfiltered water sample should not exceed 50 micrograms per litre to protect raw waters for public water supplies.

Copper

The concentration of total copper in an unfiltered water sample should not exceed 5 micrograms per litre to protect aquatic life.

Iron

The concentration of total iron in an unfiltered water sample should not exceed 300 micrograms per litre to protect aquatic life.

Lead

The concentration of total lead in an unfiltered water sample should not exceed 10 micrograms per litre in Lake Superior, 20 micrograms per litre in Lake Huron and 25 micrograms per litre in all remaining Great Lakes to protect aquatic life.

Mercury

The concentration of total mercury in a filtered water sample should not exceed 0.2 microgram per litre nor should the concentration of total mercury in whole fish exceed 0.5 microgram per gram (wet weight basis) to protect aquatic life and fish-consuming birds.

Nickel

The concentration of total nickel in an unfiltered water sample should not exceed 25 micrograms per litre to protect aquatic life.

Selenium

The concentration of total selenium in an unfiltered water sample should not exceed 10 micrograms per litre to protect raw water for public water supplies.

Zinc

The concentration of total zinc in an unfiltered water sample should not exceed 30 micrograms per litre to protect aquatic life.

(b) Other Inorganic Substances

Fluoride

The concentration of total fluoride in an unfiltered water sample should not exceed [illegible] micrograms per litre to protect raw water for public water supplies.

Total Dissolved Solids

In Lake Erie, Lake Ontario and the International Section of the St. Lawrence River, the level of total dissolved solids should not exceed [illegible] milligrams per litre. In the St. Clair River, Lake St. Clair, the Detroit River and the Niagara River, the level should be consistent with maintaining the levels of total dissolved solids in Lake Erie and Lake Ontario at not to exceed 200 milligrams per litre. In the remaining boundary waters, pending further study, the level of total dissolved solids should not exceed present levels.

B. Non-Persistent Toxic Substances

1. Organic Substances

(a) Pesticides

Diazinon

The concentration of diazinon in an unfiltered water sample should not exceed 0.06 micrograms per litre for the protection of aquatic life.

Guthion

The concentration of guthion in an unfiltered water sample should not exceed 0.005 micrograms per litre for the protection of aquatic life.

Parathion

The concentration of parathion in an unfiltered water sample should not exceed 0.008 micrograms per litre for the protection of aquatic life.

Other Pesticides

The concentration of unspecified, non-persistent pesticides should not exceed 0.01 of the median lethal concentration on a 96-hour test for any sensitive local species.

(b) Other Substances

Unspecified Non-Persistent Toxic Substances and Complex Effluents

Unspecified non-persistent toxic substances and complex effluents of municipal, industrial or other origin should not be present in concentrations which exceed [illegible] of the median

Oil and Petrochemicals

Oil and petrochemicals should not be present in concentrations that:

(i) can be detected as visible film, sheen or discolouration on the surface;

(ii) can be detected by odour;

(iii) can cause tainting of edible aquatic organisms; and

(iv) can form deposits on shorelines and bottom sediments that are detectable by sight or odour, or are deleterious to resident aquatic organisms.

2. Inorganic Substances

Ammonia

The concentration of un-ionized ammonia (NH_3) should not exceed 20 micrograms per litre for the protection of aquatic life. Concentrations of total ammonia should not exceed 500 micrograms per litre for the protection of public water supplies.

Hydrogen Sulfide

The concentration of undissociated hydrogen sulfide should not exceed 2.0 micrograms per litre to protect aquatic life.

C. Other Substances

1. Dissolved oxygen

In the connecting channels and in the upper waters of the Lakes, the dissolved oxygen level should not be less than 6.0 milligrams per litre at any time; in hypolimnetic waters, it should be not less than necessary for the support of fishlife, particularly cold water species.

2. pH

Values of pH should not be outside the range of 6.5 to 9.0, nor should discharge change the pH at the boundary of a limited use zone more than 0.5 units from that of the ambient waters.

3. Nutrients

Phosphorus

The concentration should be limited to the extent necessary to prevent nuisance growths of algae, weeds and slimes that are or may become injurious to any beneficial water use. (Specific phosphorus control requirements are set out in Annex 3.)

4. Tainting Substances

(b) Levels of phenolic compounds should not exceed 1.0 microgram per litre in public water supplies to protect against taste and odor in domestic water.

(c) Substances entering the water as the result of human activity that cause tainting of edible aquatic organisms should not be present in concentrations which will lower the acceptability of these organisms, as determined by organoleptic tests.

II. PHYSICAL

A. Asbestos

Asbestos should be kept at the lowest practical level and in any event should be controlled to the extent necessary to prevent harmful effects on human health.

B. Temperature

There should be no change in temperature that would adversely affect any local or general use of the waters.

C. Settleable and Suspended Solids, and Light Transmission

For the protection of aquatic life, waters should be free from substances attributable to municipal, industrial or other discharges resulting from human activity that will settle to form putrescent or otherwise objectionable sludge deposits or that will alter the value of Secchi disc depth by more than 10 per cent.

III. MICROBIOLOGICAL

Waters used for body contact recreation activities should be substantially free from bacteria, fungi, or viruses that may produce enteric disorders or eye, ear, nose, throat and skin infections or other human diseases and infections.

IV. RADIOLOGICAL

The level of radioactivity in waters outside of any defined source control area should not result in a TED_{50} (total equivalent dose integrated over 50 years as calculated in accordance with the methodology established by the International Commission on Radiological Protection) greater than 1 millirem to the whole body from a daily ingestion of 2.2 litres of lake water for one year. For dose commitments between 1 and 5 millirem at the periphery of the source control area, source investigation and corrective action are recommended if releases are not as low as reasonably achievable. For dose commitments greater than 5 millirem, the responsible regulatory authorities shall determine appropriate corrective action.

ANNEX 2

LIMITED USE ZONES

1. The Parties, in consultation with the State and Provincial Governments, shall take measures to define and describe all existing and future limited use zones, and shall prepare an annual report on these measures. The measures shall include:

(a) Identification and quantitative and qualitative description of all point source waste discharges (including tributaries) to boundary waters;

(b) Delineation of boundaries for limited use zones assigned to identified discharges;

(c) Assessment of the impact of the proposed limited use zones on existing and potential beneficial uses; and

(d) Continuing review and revision of the extent of limited use zones to achieve maximum possible reduction in size and effect of such zones in accordance with improvements in waste treatment technology.

2. Limited use zones within the boundary waters of the Great Lakes System shall be designated for industrial discharges, and for municipal discharges in excess of 1 million gallons per day before January 1, 1980, in accordance with the following principles:

(a) The boundary of a limited use zone shall not transect the international boundary.

(b) The size, shape and exact location of a limited use zone shall be specified on a case-by-case basis by the responsible regulatory agency. The size shall be minimized to the greatest possible degree, being no larger than that attainable by all reasonable and practicable effluent treatment measures.

(c) Specific objectives and conditions applicable to the receiving water body shall be met at the boundary of limited use zones.

(d) Existing biological, chemical, physical and hydrological conditions shall be defined before considering the location of a new limited use zone or restricting an existing one.

(e) Areas of extraordinary natural resource value shall not be designated as limited use zones.

(f) Limited use zones shall not form barriers to migratory routes of aquatic species or interfere with biological communities or populations of important species to a degree which damages the ecosystem, or diminishes other beneficial uses disproportionately. Routes of passage for specific organisms which require protection and which would normally inhabit or pass through limited use zones shall be assured either by location of the zones, or by design of conditions within the zones.

(g) Conditions shall not be permitted within the limited use zones which:

(i) are rapidly lethal to important aquatic life;

(ii) cause irreversible responses which could result in detrimental post-exposure effects; or

(iii) result in bioconcentration of toxic substances which are harmful to the organism or its consumers.

(h) Concentrations of toxic substances at any point in the limited use zone where important species are physically capable of residing shall not exceed the 24-hour LC_{50}.

(i) Every attempt shall be made to insure that the zones are free from:

(i) objectionable deposits;

(ii) unsightly or deleterious amounts of flotsam, debris, oil, scum and other floating matter;

(iii) substances producing objectionable colour, odour, taste or turbidity; and

(iv) substances and conditions or combinations thereof at levels which produce aquatic life in nuisance quantities that interfere with other uses.

(j) Limited use zones may overlap unless the combined effects exceed the conditions set forth in other guidelines.

(k) As a general condition, limited use zones should not overlap with municipal and other water intakes and recreational areas. However, knowledge of local effluent characteristics and effects could allow such a combination of uses.

3. Candidate areas for designation as limited use zones shall be reported, in all available detail, by the responsible regulatory agencies to the International Joint Commission. Within 60 days, the Commission may comment upon the extent of the area proposed for desionation as a limited use zone, or any other aspect or measure to promote the attainment of the General and Specific Objectives of this Agreement. The responsible regulatory agency will take the comments of the Commission into account prior to making a formal designation of the area as a limited use zone. If no comment is received from the Commission within 60 days, it may be assumed that the Commission agrees with the proposed designation.

4. The Parties shall consult to develop more definitive procedures to delineate the extent of individual limited use zones and to develop scientific guidelines for determining the maximum portions of the boundary waters of each of the Great Lakes and connecting channels which may be occupied by limited use zones.

ANNEX 3

CONTROL OF PHOSPHORUS

1. The purpose of the following programs is to minimize eutrophication problems and to prevent degradation with regard to phosphorus in the boundary waters of the Great Lakes System. The goals of phosphorus control are:

(a) Restoration of year-round aerobic conditions in the bottom waters of the Central Basin of Lake Erie;

(b) Substantial reduction in the present levels of algal biomass to a level below that of a nuisance condition in Lake Erie;

(c) Reduction in present levels of algal biomass to below that of a nuisance condition in Lake Ontario including the International Section of the St. Lawrence River;

(d) Maintenance of the oligotrophic state and relative algal biomass of Lakes Superior and Huron;

(e) Substantial elimination of algal nuisance growths in Lake Michigan to restore it to an oligotrophic state; and

(f) The elimination of algal nuisance in bays and in other areas wherever they occur.

2. The following programs shall be developed and implemented to reduce input of phosphorus to the Great Lakes:

(a) Construction and operation of municipal waste treatment facilities in all plants discharging more than one million gallons per day to achieve, where necessary to meet the loading allocations to be developed pursuant to paragraph 3 below, or to meet local conditions, whichever are more stringent, effluent concentrations of 1.0 milligram per litre total phosphorus maximum for plants in the basins of Lakes Superior, Michigan, and Huron, and of 0.5 milligram per litre total phosphorus maximum for plants in the basins of Lakes Ontario and Erie.

(b) Regulation of phosphorus introduction from industrial dischargers to the maximum practicable extent.

(c) Reduction to the maximum extent practicable of phosphorus introduced from diffuse sources into Lakes Superior, Michigan, and Huron; and reduction by 30 per cent of phosphorus introduced from diffuse sources into Lakes Ontario and Erie, where necessary to meet the loading allocations to be developed pursuant to paragraph 3 below, or to meet local conditions, whichever are more stringent.

(d) Reduction of phosphorus in household detergents to 0.5 per cent by weight where necessary to meet the loading allocations to be developed pursuant to paragraph 3 below, or to meet local conditions, whichever are more stringent.

(e) Maintenance of a viable research program to seek maximum efficiency and effectiveness in the control of phosphorus introductions into the Great Lakes.

3. The following table establishes phosphorus loads for the base year (1976) and future phosphorus loads. The Parties, in cooperation with the State and Provincial Governments, shall within eighteen months after the date of entry into force of this Agreement confirm the future phosphorus loads, and based on these establish load allocations and compliance schedules, taking into account the recommendations of the International Joint Commission arising from the Pollution from Land Use Activities Reference. Until such loading allocations and compliance schedules are established, the Parties agree to maintain the programs and other measures specified in Annex 3 of the Great Lakes Water Quality Agreement of 1972.

Basin	1976 Phosphorus Load in Metric Tonnes Per Year	Future Phosphorus Load in Metric Tonnes Per Year
Lake Superior	3400	3400*
Lake Michigan	6700	5600*
Main Lake Huron	3000	3800*
Georgian Bay	630	600*
North Channel	550	520*
Saginaw Bay	870	440**
Lake Erie	20000	11000**
Lake Ontario	11000	7000**

* These loadings would result if all municipal plants over one million gallons per day achieved an effluent of 1 milligram per litre of phosphorus.

** These loadings are required to meet the goals stated in paragraph 1 above.

ANNEX 4

DISCHARGES OF OIL AND HAZARDOUS POLLUTING SUBSTANCES FROM VESSELS

1. Definitions. As used in this Annex:

(a) "Discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting or dumping; it does not include unavoidable direct discharges of oil from a properly functioning vessel engine;

(b) "Harmful quantity of oil" means any quantity of oil that, if discharged from a ship that is stationary into clear calm water on a clear day, would produce a film or a sheen upon, or discolouration of, the surface of the water or adjoining shoreline, or that would cause a sludge or emulsion to be deposited beneath the surface of the water or upon the adjoining shoreline;

(c) "Oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, oil sludge, oil refuse, oil mixed with ballast or bilge water, and oil mixed with wastes other than dredged material;

(d) "Tanker" means any vessel designed for the carriage of liquid cargo in bulk; and

(e) "Vessel" means any ship, barge or other floating craft, whether or not self-propelled.

2. General Principles. Compatible regulations shall be adopted for the prevention of discharges into the Great Lakes System of harmful quantities of oil and hazardous polluting substances from vessels in accordance with the following principles:

(a) The discharge of a harmful quantity of oil or hazardous polluting substances shall be prohibited and made subject to appropriate penalties; and

(b) As soon as any person in charge has knowledge of any discharge of harmful quantities of oil or hazardous polluting substances, immediate notice of such discharge shall be given to the appropriate agency in the jurisdiction where the discharge occurs; failure to give this notice shall be made subject to appropriate penalties.

3. Oil. The programs and measures to be adopted for the prevention of discharges of harmful quantities of oil shall include:

(a) Compatible regulations for design, construction, and operation of vessels based on the following principles:

(i) Each vessel shall have a suitable means of containing on board cargo oil spills caused by loading or unloading operations;

(ii) Each vessel shall have a suitable means of containing on board fuel oil spills caused by loading or unloading operations, including those from tank vents and overflow pipes;

(iii) Each vessel shall have the capability of retaining on board oily wastes accumulated during vessel operation;

(vi) Each vessel shall be capable of off-loading retained oily wastes to a reception facility;

(v) Each vessel shall be provided with a means for rapidly and safely stopping the flow of cargo or fuel oil during loading, unloading or bunkering operations in the event of an emergency;

(vi) Each vessel shall be provided with suitable lighting to adequately illuminate all cargo and fuel oil handling areas if the loading, unloading or bunkering operations occur at night;

(vii) Hose assemblies used on board vessels for oil loading, unloading, or bunkering shall be suitably designed, identified, and inspected to minimize the possibility of failure; and

(viii) Oil loading, unloading, and bunkering systems shall be suitably designed, identified, and inspected to minimize the possibility of failure; and

(b) Programs to ensure that merchant vessel personnel are trained in all functions involved in the use, handling, and stowage of oil and in procedures for abatement of oil pollution.

4. Hazardous Polluting Substances. The programs and measures to be adopted for the prevention of discharges of harmful quantities of hazardous polluting substances carried as cargo shall include:

(a) Compatible regulations for the design, construction, and operation of vessels using as a guide the Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk as established through the Inter-Governmental Maritime Consultative Organization (IMCO), including the following requirements:

(i) Each vessel shall have a suitable means of containing on board spills caused by loading or unloading operations;

(ii) Each vessel shall have a capability of retaining on board wastes accumulated during vessel operation;

(iii) Each vessel shall be capable of off-loading wastes retained to a reception facility;

(iv) Each vessel shall be provided with a means for rapidly and safely stopping the flow during loading or unloading operations in the event of an emergency; and

(v) Each vessel shall be provided with suitable lighting to adequately illuminate all cargo handling areas if the loading or unloading operations occur at night;

(b) Identification of vessels carrying cargoes of hazardous polluting substances in bulk, containers, and package form, and of all such cargoes;

(c) Identification in vessel manifests of all hazardous polluting substances;

(d) Procedures for notification to the appropriate agency by the owner, master or agent of a vessel of all hazardous polluting substances; and

(e) Programs to ensure that merchant vessel personnel are trained in all functions involving the use, handling, and stowage of hazardous polluting substances; the abatement of pollution from such substances; and the hazards associated with the handling of such substances.

5. Additional Measures. Both Parties shall take, as appropriate, action to ensure the provision of adequate facilities for the reception, treatment, and subsequent disposal of oil and hazardous polluting substances wastes from all vessels.

ANNEX 5

DISCHARGES OF VESSEL WASTES

Definitions. As used in this Annex:

(a) "Discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, and dumping;

(b) "Garbage" means all kinds of victual, domestic, and operational wastes, excluding fresh fish and parts thereof generated during the normal operation of the ship and liable to be disposed of continually or periodically;

(c) "Sewage" means human or animal waste generated on board ship and includes wastes from water closets, urinals, or a hospital facility;

(d) "Vessel" means any ship, barge or other floating craft, whether or not self-propelled; and

(e) "Waste water" means water in combination with other substances, including ballast water and water used for washing cargo holds, but excluding water in combination with oil, hazardous polluting substances, or sewage.

1. General Principles. Compatible regulations shall be adopted governing the discharge into the Great Lakes System of garbage, sewage, and waste water from vessels in accordance with the following principles:

(a) The discharge of garbage shall be prohibited and made subject to appropriate penalties;

(b) The discharge of waste water in amounts or in concentrations that will be deleterious shall be prohibited and made subject to appropriate penalties; and

(c) Every vessel operating in these waters that is provided with toilet facilities shall be equipped with a device or devices to contain, incinerate, or treat sewage to an adequate degree; appropriate penalties shall be provided for failure to comply with the regulations.

2. Critical Use Areas. Critical use areas of the Great Lakes System may be designated where the discharge of waste water or sewage shall be limited or prohibited.

3. Containment Devices. Regulations may be established requiring a device or devices to contain the sewage of pleasure craft or other classes of vessels operating in the Great Lakes System or designated areas thereof.

4. Additional Measures. The Parties shall take, as appropriate, action to ensure the provision of adequate facilities for the reception, treatment, and subsequent disposal of garbage, waste water, and sewage from all vessels.

ANNEX 6

REVIEW OF POLLUTION FROM SHIPPING SOURCES

1. Review. The Canadian Coast Guard and the United States Coast Guard shall continue to review services, systems, programs, recommendations, standards, and regulations relating to shipping activities for the purpose of maintaining or improving Great Lakes water quality. The reviews shall include:

(a) Review of vessel equipment, vessel manning, and navigation practices or procedures, and of aids to navigation and vessel traffic management, for the purpose of precluding casualties which may be deleterious to water quality;

(b) Review of practices and procedures regarding waste water and their deleterious effect on water quality;

(c) Review of practices and procedures, as well as current technology for the treatment of vessel sewage; and

(d) Review of current practices and procedures regarding the prevention of pollution from the loading, unloading, or on board transfer of cargo.

2. Consultation. Representatives of the Canadian Coast Guard and the United States Coast Guard, and other interested agencies, shall meet at least annually to consider this Annex. A report of this annual consultation shall be furnished to the International Joint Commission prior to its annual meeting on Great Lakes water quality. The purpose of the consultation shall be to:

(a) Provide an interchange of information with respect to continuing reviews, ongoing studies, and areas of concern;

(b) Identify and determine the relative importance of problems requiring further study; and

(c) Apportion responsibility, as between the Canadian Coast Guard and the United States Coast Guard, for the studies, or portions thereof, which were identified in subparagraph 2(b) above.

3. Studies. Where a review identifies additional areas for improvement, the Canadian Coast Guard and the United States Coast Guard, and other interested agencies, will undertake a study to establish improved procedures for the abatement and control of pollution from shipping sources, and will:

(a) Develop a brief study description which will include the nature of the perceived problem, procedures to quantify the problem, alternative solutions to the problem, procedures to determine the best alternative, and an estimated completion date;

(b) Transmit study descriptions to the International Joint Commission and other interested agencies;

(c) Transmit the study, or a brief summary of its conclusions, to the International Joint Commission and other interested agencies; and

(d) Transmit a brief status report to the International Joint Commission and other interested agencies if the study is not completed by the estimated completion date.

4. Responsibility. Responsibility for the coordination of the review, consultation, and studies is assigned to the Canadian Coast Guard and the United States Coast Guard.

ANNEX 7

DREDGING

1. There shall be established, under the auspices of the Water Quality Board, a Subcommittee on Dredging. The Subcommittee shall:

(a) Review the existing practices in both countries relating to dredging activities, as well as the previous work done by the International Working Group on Dredging, with the objective of developing, within one year of the date of entry into force of this Agreement, compatible guidelines and criteria for dredging activities in the boundary waters of the Great Lakes System;

(b) Maintain a register of significant dredging projects being undertaken in the Great Lakes System with information to allow for the assessment of the environmental effects of the projects. The register shall include pertinent statistics to allow for the assessment of pollution loadings from dredged materials to the Great Lakes System;

(c) Encourage the exchange of information relating to developments of dredging technology and environmental research.

2. The Subcommittee shall identify specific criteria for the classification of polluted sediments of designated areas of intensive and continuing dredging activities within the Great Lakes System. Pending development of criteria and guidelines by the Subcommittee, and their acceptance by the Parties, the Parties shall continue to apply the criteria now in use by the regulatory authorities; however, neither Party shall be precluded from applying standards more stringent than those now in use.

3. The Parties shall continue to direct particular attention to the identification and preservation of significant wetland areas in the Great Lakes Basin Ecosystem which are threatened by dredging and disposal activities.

4. The Parties shall encourage research to investigate advances in dredging technology and the pathways, fate and effects of nutrients and contaminants of dredged materials.

5. The Subcommittee shall undertake any other activities as the Water Quality Board may direct.

ANNEX 2

DISCHARGES FROM ONSHORE AND OFFSHORE FACILITIES

1. Definitions. As used in this Annex:

(a) "Discharge" means the introduction of polluting substances into receiving waters and includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting or dumping; it does not include continuous effluent discharges from municipal or industrial treatment facilities;

(b) "Harmful quantity of oil" means any quantity of oil that, if discharged into clear calm waters on a clear day, would produce a film or sheen upon, or discolouration of the surface of the water or adjoining shoreline, or that would cause a sludge or emulsion to be deposited beneath the surface of the water or upon the adjoining shoreline;

(c) "Facility" includes motor vehicles, rolling stock, pipelines, and any other facility that is used or capable of being used for the purpose of processing, producing, storing, disposing, transferring or transporting oil or hazardous polluting substances, but excludes vessels;

(d) "Offshore facility" means any facility of any kind located in, on or under any water;

(e) "Onshore facility" means any facility of any kind located in, on or under, any land other than submerged land;

(f) "Oil" means oil of any kind or in any form, including, but not limited to petroleum, fuel oil, oil sludge, oil refuse, and oil mixed with wastes, but does not include constituents of dredged spoil.

2. Principles. Regulations shall be adopted for the prevention of discharges into the Great Lakes System of harmful quantities of oil and hazardous polluting substances from onshore and offshore facilities in accordance with the following principles:

(a) Discharges of harmful quantities of oil or hazardous polluting substances shall be prohibited and made subject to appropriate penalties;

(b) As soon as any person in charge has knowledge of any discharge of harmful quantities of oil or hazardous polluting substances, immediate notice of such discharge shall be given to the appropriate agency in the jurisdiction where the discharge occurs; failure to give this notice shall be made subject to appropriate penalties.

3. Programs and Measures. The programs and measures to be adopted shall include the following:

(a) Review of the design, construction, and location of both existing and new facilities for their adequacy to prevent the discharge of oil or hazardous polluting substances;

(b) Review of the operation, maintenance and inspection procedures of facilities for their adequacy to prevent the discharge of oil or hazardous polluting substances;

(c) Development and implementation of regulations and personnel training programs to ensure the safe use and handling of oil or hazardous polluting substances;

(d) Programs to ensure that at each facility plans and provisions are made and equipment provided to stop rapidly and safely, contain, and clean up discharges of oil or hazardous polluting substances; and

(e) Compatible regulations and other programs for the identification and placarding of containers, vehicles and other facilities containing, carrying or handling oil or hazardous polluting substances; and, where appropriate, notification to appropriate agencies of vehicle movements, maintenance of a registry, and identification in manifests of such substances to be carried.

4. Implementation.

(a) Each Party shall submit a report to the International Joint Commission outlining its programs and measures, existing or proposed, for the implementation of this Annex within six months of the date of entry into force of this Agreement.

(b) The report shall outline programs and measures, existing or proposed, for each of the following types of onshore and offshore facilities:

(i) land transportation including rail and road modes;

(ii) pipelines on land and submerged under water;

(iii) offshore drilling rigs and wells;

(iv) storage facilities both onshore and offshore; and

(v) wharves and terminals with trestle or underwater pipeway connections to land and offshore island type structures and buoys used for the handling of oil or hazardous polluting substances.

(c) The report shall outline programs and measures, existing or proposed, for any other type of onshore or offshore facility.

(d) Upon receipt of the reports, the Commission, in consultation with the Parties, shall review the programs and measures outlined for adequacy and compatibility and, if necessary, make recommendations to rectify any such inadequacy or incompatibility it finds.

ANNEX 9

JOINT CONTINGENCY PLAN

2. The Plan. The "Joint Canada-United States Marine [illegible] Contingency Plan for the Great Lakes (CANUSLAK)" [illegible] June 20, 1974, shall be maintained in force, as [illegible] from time to time. The Canadian Coast Guard and the [illegible] States Coast Guard shall, in cooperation with other [illegible] agencies, identify and provide detailed Supplements for [illegible] areas of high risk and of particular concern in augmentation of CANUSLAK. It shall be the responsibility of the United States Coast Guard and the Canadian Coast Guard to coordinate and to maintain the Plan and the Supplements appended to the Plan.

3. Purpose. The purpose of the Plan is to provide for coordinated and integrated response to pollution incidents in the Great Lakes System by responsible federal, state, provincial and local agencies. The Plan supplements the national, provincial and regional plans of the Parties.

4. Pollution Incidents.

(a) A pollution incident is a discharge, or an imminent threat of discharge of oil, hazardous polluting substance or other substance of such magnitude or significance as to require immediate response to contain, clean up, and dispose of the material.

(b) The objectives of the Plan in pollution incidents are:

(i) To develop appropriate preparedness measures and effective systems for discovery and reporting the existence of a pollution incident within the area covered by the Plan;

(ii) To institute prompt measures to restrict the further spread of the pollutant; and

(iii) To provide adequate cleanup response to pollution incidents.

5. Funding. The costs of operations of both Parties under the Plan shall be borne by the Party in whose waters the pollution incident occurred, unless otherwise agreed.

6. Amendment. The Canadian Coast Guard and the United States Coast Guard are empowered to amend the Plan subject to the requirement that such amendments shall be consistent with the purpose and objectives of this Annex.

ANNEX 10

HAZARDOUS POLLUTING SUBSTANCES

1. The Parties shall:

(a) Maintain a list, to be known as Appendix 1 of this Annex (hereinafter referred to as Appendix 1), of substances known to have toxic effects on aquatic and animal life and a risk of being discharged to the Great Lakes System;

(b) Maintain a list, to be known as Appendix 2 of this Annex (hereinafter referred to as Appendix 2), of substances potentially having such effects and such a risk of discharge, and to give priority to the examination of these substances for possible transfer to Appendix 1;

(c) Ensure that these lists are continually revised in the light of growing scientific knowledge; and

(d) Develop and implement programs and measures to minimize or eliminate the risk of release of hazardous polluting substances to the Great Lakes System.

2. Hazardous polluting substances to be listed in Appendix 1 shall be determined in accordance with the following procedures:

(a) Selection of all hazardous substances for listing in Appendix 1 shall be based upon documented toxicological and discharge potential data which have been evaluated by the Parties and deemed to be mutually acceptable.

(b) Revisions to Appendix 1 may be made by mutual consent of the Parties and shall be treated as amendments to this Annex for the purposes of Article XIII of this Agreement.

(c) Using the agreed selection criteria, either Party may recommend at any time a substance to be added to the list in Appendix 1. Both substance need not previously have been listed in Appendix 2. The Party receiving the recommendation will have 60 days to review the associated documentation and either reject the proposed substance or accept the substance pending completion of appropriate procedural or domestic regulatory requirements. Cause for rejection must be documented and submitted to the initiating Party and may be the basis for any further negotiations.

3. The criteria to be applied to the selection of substances as candidates for listing in Appendix 1 are:

(a) Acute toxicological effects, as determined by whether the substance is lethal to:

(i) One-half of a test population of aquatic animals in 96 hours or less at a concentration of 500 milligrams per litre or less; or

(ii) One-half of a test population of animals in 14 days or less when administered in a single oral dose equal to or less than 50 milligrams per kilogram of body weight; or

(iii) One-half of a test population of animals in 14 days or less when dermally exposed to an amount equal to or less than 200 milligrams per kilogram body weight for 24 hours; or

(iv) One-half of a test population of animals in 14 days or less when exposed to a vapour concentration equal to or less than 20 cubic centimeters per cubic meter in air for one hour; or

(v) Aquatic flora as measured by a maximum specific growth rate or total yield of biomass which is 50 per cent lower than a control culture over 14 days in a medium at concentrations equal to or less than 100 milligrams per litre.

(b) Risk of discharge into the Great Lakes System, as determined by:

(i) Gathering information on the history of discharges or accidents;

(ii) Assessing the modal risks during transport and determining the use and distribution patterns;

(iii) Identifying quantities manufactured or imported.

4. Potentially hazardous polluting substances to be listed in Appendix 2 of this Annex shall be determined in accordance with the following procedures:

(a) Either Party may add new substances to Appendix 2 by notifying the other in writing that the substance is considered to be a potential hazard because of documented information concerning aquatic toxicity, mammalian and other vertebrate toxicity, phytotoxicity, persistence, bio-accumulation, mutagenicity, teratogenicity, carcinogenicity, environmental translocation or because of documented information on risk of discharge to the environment. The documentation of the potential hazard and the selected criteria upon which it is based will also be submitted.

(b) Removal of substances from Appendix 2 shall be by mutual consent of the Parties.

(c) The Parties shall give priority to the examination of substances listed in Appendix 2 for possible transfer to Appendix 1.

5. Programs and measures to control the risk of pollution from transport, storage, handling and disposal of hazardous polluting substances are contained in Annexes 4 and 6.

APPENDIX 1

HAZARDOUS POLLUTING SUBSTANCES

Acetaldehyde
Acetic Acid
Acetic Anhydride
Acetone Cyanohydrin
Acetyl Bromide
Acetyl Chloride
Acrolein
Acrylonitrile
Aldrin
Allyl Alcohol
Allyl Chloride
Aluminum Sulfate
Ammonia
Ammonium Acetate
Ammonium Benzoate
Ammonium Bicarbonate
Ammonium Bichromate
Ammonium Bifluoride
Ammonium Bisulfite
Ammonium Carbamate
Ammonium Carbonate
Ammonium Chloride
Ammonium Chromate
Ammonium Citrate, Dibasic
Ammonium Fluoborate
Ammonium Fluoride
Ammonium Hydroxide
Ammonium Oxalate
Ammonium Silicofluoride
Ammonium Sulfamate
Ammonium Sulfide
Ammonium Sulfite
Ammonium Tartrate
Ammonium Thiocyanate
Ammonium Thiosulfate
Amyl Acetate
Aniline
Antimony Pentachloride
Antimony Potassium Tartrate
Antimony Tribromide
Antimony Trichloride
Antimony Trifluoride
Antimony Trioxide
Arsenic Disulfide
Arsenic Pentoxide
Arsenic Trichloride
Arsenic Trioxide
Arsenic Trisulfide
Barium Cyanide
Benzene
Benzoic Acid
Benzonitrile
Benzoyl Chloride
Benzyl Chloride
Beryllium Chloride
Beryllium Fluoride
Beryllium Nitrate
Butyl Acetate
Butylamine
Butyric Acid
Cadmium Acetate
Cadmium Bromide
Cadmium Chloride
Calcium Arsenate
Calcium Arsenite
Calcium Carbide
Calcium Chromate
Calcium Cyanide
Calcium Dodecylbenzenesulfonate
Calcium Hydroxide
Calcium Hypochlorite
Calcium Oxide
Captan
Carbaryl
Carbon Disulfide
Chlordane
Chlorine
Chlorobenzene
Chloroform
Chlorosulfonic Acid
Chromic Acetate
Chromic Acid
Chromic Sulfate
Chromous Chloride
Cobaltous Bromide
Cobaltous Formate
Cobaltous Sulfamate
Coumaphos
Cresol
Cupric Acetate
Cupric Acetoarsenite
Cupric Chloride
Cupric Nitrate
Cupric Oxalate
Cupric Sulfate
Cupric Sulfate, Ammoniated
Cupric Tartrate
Cyanogen Chloride
Cyclohexane
2,4-D Acid
2,4-D Esters
Dalapon
DDT
Diazinon
Dicamba
Dichlobenil
Dichlone
Dichlorvos
Dieldrin
Diethylamine
Dimethylamine
Dinitrobenzene (mixed)
Dinitrophenol
Diquat
Disulfoton
Diuron
Dodecylbenzenesulfonic Acid
Endosulfan
Endrin
Ethion
Ethylbenzene
Ethylenediamine
EDTA
Ferric Ammonium Citrate
Ferric Ammonium Oxalate
Ferric Chloride
Ferric Fluoride
Ferric Nitrate
Ferric Sulfate
Ferrous Ammonium Sulfate
Ferrous Chloride
Ferrous Sulfate
Formaldehyde
Formic Acid
Fumaric Acid
Furfural
Guthion
Heptachlor
Hydrocyanic Acid
Hydrofluoric Acid
Hydrogen Cyanide
Isoprene
Isopropanolamine Dodecylbenzenesulfonate
Kelthane
Lead Acetate
Lead Arsenate
Lead Chloride
Lead Fluoborate
Lead Fluoride
Lead Iodide
Lead Nitrate
Lead Stearate
Lead Sulfate
Lead Sulfide
Lead Thiocyanate
Lindane
Lithium Chromate
Malathion
Maleic Acid
Maleic Anhydride
Mercuric Cyanide
Mercuric Nitrate
Mercuric Sulfate
Mercuric Thiocyanate
Mercurous Nitrate
Methoxychlor
Methyl Mercaptan
Methyl Methacrylate
Methyl Parathion
Mevinphos
Mexacarbate
Monoethylamine
Monomethylamine
Naled
Naphthalene
Naphthenic Acid
Nickel Ammonium Sulfate
Nickel Chloride
Nickel Hydroxide
Nickel Nitrate
Nickel Sulfate
Nitric Acid
Nitrobenzene
Nitrogen Dioxide
Nitrophenol (mixed)
Paraformaldehyde
Parathion
Pentachlorophenol
Phenol
Phosgene
Phosphoric Acid
Phosphorus
Phosphorus Oxychloride
Phosphorus Pentasulfide
Phosphorus Trichloride
Polychlorinated Biphenyls
Potassium Arsenate

Potassium Arsenite
Potassium Bichromate
Potassium Chromate
Potassium Cyanide
Potassium Hydroxide
Potassium Permanganate
Propionic Acid
Propionic Anhydride
Pyrethrins
Quinoline
Resorcinol
Selenium Oxide
Sodium
Sodium Arsenate
Sodium Arsenite
Sodium Bichromate
Sodium Bifluoride
Sodium Bisulfite
Sodium Chromate
Sodium Cyanide
Sodium Dodecylbenzenesulfonate
Sodium Fluoride
Sodium Hydrosulfide
Sodium Hydroxide
Sodium Hypochlorite
Sodium Methylate
Sodium Nitrite
Sodium Phosphate, Dibasic
Sodium Phosphate, Tribasic
Sodium Selenite
Strontium Chromate
Strychnine
Styrene
Sulfuric Acid
Sulfur Monochloride
2,4,5-T Acid
2,4,5-T Esters
TDE
Tetraethyl Lead
Tetraethyl Pyrophosphate
Toluene
Toxaphene
Trichlorfon
Trichlorophenol
Triethanolamine Dodecylbenzenesulfonate
Triethylamine
Trimethylamine
Uranyl Acetate
Uranyl Nitrate
Vanadium Pentoxide
Vanadyl Sulfate
Vinyl Acetate
Xylene (Mixed)
Xylenol
Zinc Acetate
Zinc Ammonium Chloride
Zinc Borate
Zinc Bromide
Zinc Carbonate
Zinc Chloride
Zinc Cyanide
Zinc Fluoride
Zinc Formate
Zinc Hydrosulfite
Zinc Nitrate
Zinc Phenolsulfonate
Zinc Phosphide
Zinc Silicofluoride
Zinc Sulfate
Zirconium Nitrate
Zirconium Potassium Fluoride
Zirconium Sulfate
Zirconium Tetrachloride

ARTICLE 2

POTENTIAL HAZARDOUS POLLUTING SUBSTANCES

Acridine
Allethrin
Aluminum Fluoride
Aluminum Nitrate
Ammonium Bromide
Ammonium Hypophosphite
Ammonium Iodide
Ammonium Pentaborate
Ammonium Persulfate
Antimony Pentafluoride
Antimycin A
Arsenic Acid
Barban
Benfluralin
Benzidine
Benzene Hexachloride
Beryllium Sulfate
Butifos
Cadmium
Cadmium Cyanide
Cadmium Nitrate
Captafol
Carbophenothion
Chlorflurazole
Chlorothion
Chlorpropham
Chromic Chloride
Chromium
Chromyl Chloride
Cobaltous Fluoride
Copper
Crotoxyphos
Cupric Carbonate
Cupric Citrate
Cupric Formate
Cupric Glycinate
Cupric Lactate
Cupric Paraamino Benzoate
Cupric Salicylate
Cupric Subacetate
Cuprous Bromide
Dazomet
Dibutyl Phthalate
Dicapthon
2,4-Dinitrochlorobenzene
p-Dinitrocresol
Dinocap
Dinoseb
Dioxathion
Dodine
EPN
Cobalt Trichloride
Hexachlorophene
Hydrogen Sulfide
o-Hydroxybenzoic Acid
p-Hydroxybenzoic Acid
Hydroxylamine
2-Hydroxyphenazine-1-Carboxylic Acid
Lactonitrile
Lead Tetraacetate
Lead Thiosulfate
Lead Titanate
Lithium Bichromate
Malachite Green
Manganese Chloride, Anhydrous
MCPA
Mercuric Acetate
Mercuric Chloride
Mercury
Metam-Sodium
p-Methylamino-Phenol
2-Methyl-Napthoquinone
Neburon
Nickel Formate
Phenylmercuric Acetate
n-Phenyl Naphthylamine
Phorate
Phosphamidon
Picloram
Potassium Azide
Potassium Cuprocyanide
Potassium Ferricyanide
Propyl Alcohol
Pyridyl Mercuric Acetate
Rotenone
Silver
Silver Nitrate
Silver Sulfate
Sodium Azide
Sodium 2-Chlorotoluene-5-Sulfonate
Sodium Pentachlorophenate
Sodium Phosphate, Monobasic
Sodium Sulfide
Stannous Fluoride
Strontium Nitrate
Sulfoxide
Temephos
Thallium
Thionazin
1,2,4-Trichlorobenzene
Uranium Peroxide
Uranyl Sulfate
Zinc Bichromate
Zinc Potassium Chromate
Zirconium Acetate
Zirconium Oxychloride

SURVEILLANCE AND MONITORING

1. Surveillance and monitoring activities shall be undertaken for the following purposes:

(a) Compliance. To assess the degree to which jurisdictional control requirements are being met.

(b) Achievement of General and Specific Objectives. To provide definitive information on the location, severity, areal or volume extent, frequency and duration of non-achievement of the Objectives, as a basis for determining the need for more stringent control requirements.

(c) Evaluation of Water Quality Trends. To provide information for measuring local and whole lake response to control measures using trend analyses and cause/effect relationships, and to provide information which will assist in the development and application of predictive techniques for assessing impact of new developments and pollution sources. The results of water quality evaluations will be used for:

(i) assessing the effectiveness of remedial and preventative measures and identifying the need for improved pollution control;

(ii) assessing enforcement and management strategies; and

(iii) identifying the need for further technology development and research activities.

(d) Identification of Emerging Problems. To determine the presence of new or hitherto undetected problems in the Great Lakes Basin Ecosystem, leading to the development and implementation of appropriate pollution control measures.

2. A joint surveillance and monitoring program necessary to ensure the attainment of the foregoing purposes shall be developed and implemented among the Parties and the State and Provincial Governments. The Great Lakes International Surveillance Plan contained in the Water Quality Board Annual Report of 1975 and revised in subsequent reports shall serve as a model for the development of the joint surveillance and monitoring program.

3. The program shall include baseline data collection, sample analysis, evaluation and quality assurance programs (including standard sampling and analytical methodology, inter-laboratory comparisons, and compatible data management) to allow assessments of the following:

(a) Inputs from tributaries, point source discharges, atmosphere, and connecting channels;

(b) Whole lake data including that for nearshore areas (such as harbours and embayments, general shoreline and cladophora growth areas), open waters of the Lakes, fish contaminants, and wildlife contaminants; and

(c) Outflows including connecting channels, water intakes and outlets.

PERSISTENT TOXIC SUBSTANCES

1. Definitions. As used in this Annex:

(a) "Persistent toxic substance" means any toxic substance with a half-life in water of greater than eight weeks;

(b) "Half-life" means the time required for the concentration of a substance to diminish to one-half of its original value in a lake or water body;

(c) "Early warning system" means a procedure to anticipate future environmental contaminants (i.e., substances having an adverse effect on human health or the environment) and to set priorities for environmental research, monitoring and regulatory action.

2. General Principles.

(a) Regulatory strategies for controlling or preventing the input of persistent toxic substances to the Great Lakes System shall be adopted in accordance with the following principles:

(i) The intent of programs specified in this Annex is to virtually eliminate the input of persistent toxic substances in order to protect human health and to ensure the continued health and productivity of living aquatic resources and water's use thereof;

(ii) The philosophy adopted for control of inputs of persistent toxic substances shall be zero discharge.

(b) The Parties shall take all reasonable and practical measures to rehabilitate those portions of the Great Lakes System adversely affected by persistent toxic substances.

3. Programs. The Parties, in cooperation with the State and Provincial Governments, shall develop and adopt the following programs and measures for the elimination of discharges of persistent toxic substances:

(a) Identification of raw materials, processes, products, by-products, waste sources and emissions involving persistent toxic substances, and quantitative data on the substances, together with recommendations on handling, use and disposition. Every effort shall be made to complete this inventory by January, 1982;

(b) Establishment of close coordination between air, water and solid waste programs in order to assess the total input of toxic substances to the Great Lakes System and to define comprehensive, integrated controls;

(c) Joint programs for disposal of hazardous materials to ensure that these materials such as pesticides, contaminated petroleum products, contaminated sludge and dredge spoils and industrial wastes are properly transported and disposed of. Every effort shall be made to implement these programs by 1980.

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

January 25, 1983

TO: Staughton Lynd, Esquire

Brent L. English, Esquire

(Blair S. McMillin, Esquire
(Thomas R. Wright, Esquire
(Eric A. Schaffer, Esquire

Martin Green, Esquire *

NOTICE OF JUDGMENT

A Judgment-Order was entered today in case No. 82-5156 and a copy is enclosed herewith.

PETITION FOR REHEARING (FRAP 40)

When a petition for rehearing has been filed by a party as provided by FRAP 35(b) or 40(a), unless the petition for panel rehearing under 40(a) states explicitly it does not request en banc hearing under 35(b), it is presumed that such petition requests both panel rehearing and rehearing en banc.

Filing Time

A petition may be filed within 14 days after entry of judgment. No extension will be granted save for the most compelling reasons. The petition must be received in the Clerk's office within the 14 day period.

The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. No answer to a petition for rehearing will be received unless requested by the court. Oral argument in support of the petition will not be permitted.

*See attached bill of costs form.

CH
Encs.

(over)

FOR THE THIRD CIRCUIT

No. 82-5150

LAKE ERIE ALLIANCE FOR THE PROTECTION OF THE COASTAL CORRIDOR, et al.,

Appellants

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.

(Civil No. 79-110 - W.D.Pa. - Erie)

Argued January 24, 1983

BEFORE: SEITZ, Chief Judge, ADAMS and GARTH, Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

By the Court,

Chief Judge

ATTEST:

Sally Privos, Clerk

DATED: JAN 25 1983

OFFICE OF THE CLERK

SALLY MRVOS
CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA 19106

TELEPHONE
215-597-2995

January 31, 1983

Re: Lake Erie Alliance for the Protection of the Coastal Corridor, etc., et al, Appellants vs. United States Army Corps of Engineers, etc., et al.
No. 82-5156

Dear Counsel:

Enclosed herewith is conformed copy of Order entered by the Court today in the above-entitled case

Very truly yours,

Sally Mrvos, Clerk

By: Betty J. Robinson
Betty J. Robinson
Deputy Clerk

CH

Enclosure

cc to all parties

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

February 16, 1983

TO: Staughton Lynd, Esquire
Lorent L. English, Esquire

(Blair S. McMillin, Esquire
(Thomas R. Wright, Esquire
(Eric A. Schaffer, Esquire

Martin Green, Esquire *

NOTICE OF JUDGMENT

A Judgment-Order was entered today in case No. 82-5156 and a copy is enclosed herewith.

PETITION FOR REHEARING (FRAP 40)

When a petition for rehearing has been filed by a party as provided by FRAP 35(b) or 40(a), unless the petition for panel rehearing under 40(a) states explicitly it does not request en banc hearing under 35(b), it is presumed that such petition requests both panel rehearing and rehearing en banc.

Filing Time

A petition may be filed within 14 days after entry of judgment. No extension will be granted save for the most compelling reasons. The petition must be received in the Clerk's office within the 14 day period.

The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. No answer to a petition for rehearing will be received unless requested by the court. Oral argument in support of the petition will not be permitted.

*See attached bill of costs form.
ch

(over)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5156

LAKE ERIE ALLIANCE FOR THE PROTECTION
OF THE COASTAL CORRIDOR, et al.,

Appellants

v.

UNITED STATES ARMY CORPS OF
ENGINEERS, et al.

(Civil No. 79-110 - W. D. Pa. - Erie)

PRESENT: SEITZ, Chief Judge, ADAMS and GARTH, Circuit Judges.

O R D E R

ORDERED that the Judgment Order dated January 25, 1983, is suspended pending further action by the Court.

The Court continues its desire to receive a response from United States Steel.

By the Court,

Chief Judge

DATED: January 31, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5156

LAKE ERIE ALLIANCE FOR THE PROTECTION
OF THE COASTAL CORRIDOR, et al.,
Appellants

v.

UNITED STATES ARMY CORPS OF
ENGINEERS, et al.

(Civil No. 79-110 - W. D. Pa. - Erie)

Argued January 24, 1983
Before: SEITZ, Chief Judge, ADAMS and GARTH, Circuit Judges.

JUDGMENT ORDER

The Court having entered a Judgment Order dated January 25, 1983, and having, thereafter, suspended the operation of that Order pending further action by the Court and after further consideration, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

By the Court,

Chief Judge

ATTEST:

Sally Nevos, Clerk

DATED: FEB 16 1983

OFFICE OF THE CLERK

SALLY MRVOS
CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA 19106

TELEPHONE
215-597-2995

March 11, 1983

Re: Lake Erie Alliance for the Protection of the Coastal Corridor, etc., et al., Appellants vs. United States Army Corps of Engineers, etc., et al.
No. 82-5156

Dear Counsel:

Enclosed herewith is conformed copy of Order entered by the Court today in the above-entitled case

Very truly yours,

Sally Mrvos, Clerk

By: Betty J. Robinson
Betty J. Robinson
Deputy Clerk

BJR:ch

Enc.

cc to all parties

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 82-5156

LAKE ERIE FOR THE PROTECTION OF THE COASTAL CORRIDOR, et al.,

Appellants

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.

(Civil No. 79-110 - W.D.Pa. - Erie)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, District Judges.

The petition for rehearing filed by Appellants

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

DATED: MAR 11 1983

Collins J. Seitz, Chief Judge

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ic, Social and Environmental Effects of Civil Works Projects). That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered; among those are conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production, and, in general, the needs and welfare of the people. No permit will be granted unless its issuance is found to be in the public interest.

(2) The following general criteria will be considered in the evaluation of every application:

(i) The relative extent of the public and private need for the proposed structure or work;

(ii) The desirability of using appropriate alternative locations and methods to accomplish the objective of the proposed structure or work;

(iii) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work may have on the public and private uses to which the area is suited; and

(iv) The probable impact of each proposal in relation to the cumulative effect created by other existing and anticipated structures or work in the general area.

(b) *Effect on wetlands.* (1) Wetlands are vital areas that constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest.

(2) Wetlands considered to perform functions important to the public interest include:

(i) Wetlands which serve important natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic or land species;

(ii) Wetlands set aside for study of the aquatic environment or as sanctuaries or refuges;

(iii) Wetlands, the destruction or alteration of which would affect detrimentally natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics;

(iv) Wetlands which are significant in shielding other areas from wave action, erosion, or storm damage. Such wetlands are often associated with barrier beaches, islands, reefs and bars;

(v) Wetlands which serve as valuable storage areas for storm and flood waters;

(vi) Wetlands which are prime natural recharge areas. Prime recharge areas are locations where surface and ground water are directly interconnected; and

(vii) Wetlands through natural water filtration processes serve to purify water.

(3) Although a particular alteration of wetlands may constitute a minor change, the cumulative effect of numerous such piecemeal changes often results in a major impairment of the wetland resources. Thus, the particular wetland site for which an application is made will be evaluated with the recognition that it is part of a complete and interrelated wetland area. In addition, the District Engineer may undertake reviews of particular wetland areas in consultation with the appropriate Regional Director of the Fish and Wildlife Service, the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, the Regional Administrator of the Environmental Protection Agency, the local representative of the Soil Conservation Service of the Department of Agriculture, and the head of the appropriate State agency to assess the cumulative effect of activities in such areas.

(4) No permit will be granted to work in wetlands identified as important by paragraph (b) (2) of this section, unless the District Engineer concludes, on the basis of the analysis required in paragraph (a), above, that the benefits of the proposed alteration outweigh the damage to the wetlands resource and the proposed alteration is necessary to realize those benefits. In evaluating whether a particular alteration is necessary, the District Engineer shall consider whether the pro-

posed activity is primarily dependent on being located in, or in close proximity to the aquatic environment and whether feasible alternative sites are available. The applicant must provide sufficient information on the need to locate the proposed activity in the wetland and must provide data on the basis of which the availability of feasible alternative sites can be evaluated.

(5) In addition to the policies expressed in this subpart the Congressional policy expressed in the Estuary Protection Act, Pub. L. 90-454, and State regulatory laws or programs for classification and protection of wetlands will be given great weight.

(c) *Fish and wildlife.* In accordance with the Fish and Wildlife Coordination Act (§ 320.3(e) above) Corps of Engineers officials will consult with the Regional Director, U.S. Fish and Wildlife Service, the Regional Director, National Marine Fisheries Service, and the head of the agency responsible for fish and wildlife for the state in which the work is to be performed, with a view to the conservation of wildlife resources by prevention of their direct and indirect loss and damage due to the activity proposed in a permit application. They will give great weight to these views on fish and wildlife considerations in evaluating the application. The applicant will be urged to modify his proposal to eliminate or mitigate any damage to such resources, and in appropriate cases the permit may be conditioned to accomplish this purpose.

(d) *Water quality.* Applications for permits for activities which may affect the quality of a water of the United States will be evaluated for compliance with applicable effluent limitations, water quality standards, and management practices during the construction, operation, and maintenance of the proposed activity. Certification of compliance with applicable effluent limitations and water quality standards required under provisions of Section 401 of the Federal Water Pollution Control Act will be considered conclusive with respect to water quality considerations unless the Regional Administrator, Environmental Protection Agency (EPA), advises of other water quality aspects to be taken into consideration. Any permit issued may be conditioned to implement water quality protection measures.

(e) *Historic, scenic, and recreational values.* (1) Applications for permits covered by this regulation may involve areas which possess recognized historic, cultural, scenic, conservation, recreational or similar values. Full evaluation of the general public interest requires that due consideration be given to the effect which the proposed structure or activity may have on the enhancement, preservation, or development of such values. Recognition of those values is often reflected by State, regional, or local land use classifications, or by similar Federal controls or policies. In both cases, action on permit applications should, insofar as possible, be consistent with, and avoid adverse effect on, the values or purposes for which those classifications, controls, or policies were established.

(2) Specific application of the policy in paragraph (e)(1) of this section, applies to:

(i) Rivers named in Section 3 of the Wild and Scenic Rivers Act (82 Stat. 906, 16 U.S.C. 1273 et seq.); those proposed for inclusion as provided by Sections 4 and 5 of the Act, or by later legislation; and wild, scenic, and recreational rivers established by State and local entities;

(ii) Historic, cultural, or archeological sites or practices as provided in the National Historic Preservation Act of 1966 (83 Stat. 852, 42 U.S.C. 4321 et seq.) (see also Executive Order 11593, May 13, 1971, and Statutes there cited). Particular attention should be directed toward any district, site, building, structure, or object listed or eligible for listing in the National Register of Historic Places;

(iii) Sites included in or determined eligible for listing in the National Registry of Natural Landmarks which are published periodically in the FEDERAL REGISTER;

(iv) Sites acquired or developed with the assistance of the Land and Water Conservation Fund (78 Stat. 897, 16 U.S.C. 460, 1-4, et seq.) or the Recreational Demonstrations Projects Act of 1942 (Pub. L. 77-594, 56 Stat. 326)

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PART 121—STATE CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL LICENSE OR PERMIT

Subpart A—General

AUTHORITY: Secs. 21 (b) and (c), 84 Stat. 91; 33 U.S.C. 1171(b) (1970). Reorganization Plan No. 3 of 1970.

SOURCE: 36 FR 22487, Nov. 25, 1971, unless otherwise noted. Redesignated at 37 FR 21441, Oct. 11, 1972 and 44 FR 32899, June 7, 1979.

Subpart A—General

§ 121.1 Definitions.

As used in this part, the following terms shall have the meanings indicated below:

(a) "License or permit" means any license or permit granted by an agency of the Federal Government to conduct any activity which may result in any discharge into the navigable waters of the United States.

(b) "Licensing or permitting agency" means any agency of the Federal Government to which application is made for a license or permit.

(c) "Administrator" means the Administrator, Environmental Protection Agency.

(d) "Regional Administrator" means the Regional designee appointed by the Administrator, Environmental Protection Agency.

(e) "Certifying Agency" means the person or agency designated by the Governor of a State, by statute, or by other governmental act, to certify compliance with applicable water quality standards. If an interstate agency has sole authority to so certify for the area within its jurisdiction, such interstate agency shall be the certifying agency. Where a State agency and an interstate agency have concurrent authority to certify, the State agency shall be the certifying agency. Where water quality standards have been promulgated by the Administrator pursuant to section 10(c)(2) of the Act, or where no State or interstate agency has authority to certify, the Administrator shall be the certifying agency.

(f) "Act" means the Federal Water Pollution Control Act, 33 U.S.C. 1151, et seq.

(g) "Water Quality Standards" means standards established pursuant to section 10(c) of the Act, and State-adopted water quality standards for navigable waters which are not interstate waters.

§ 121.2 Contents of certification.

(a) A certification made by a certifying agency shall include the following:

(1) The name and address of the applicant;

(2) A statement that the certifying agency has either (i) examined the application made by the applicant to the licensing or permitting agency (specifically identifying the number or code affixed to such application) and bases its certification upon an evaluation of the information contained in such application which is relevant to water quality considerations, or (ii) examined other information furnished by the applicant sufficient to permit the certifying agency to make the statement described in paragraph (a)(3) of this section;

(3) A statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards;

(4) A statement of any conditions which the certifying agency deems necessary or desirable with respect to the discharge of the activity; and

(5) Such other information as the certifying agency may determine to be appropriate.

(b) The certifying agency may modify the certification in such manner as may be agreed upon by the certifying agency, the licensing or permitting agency, and the Regional Administrator.

§ 121.3 Contents of application.

A licensing or permitting agency shall require an applicant for a license or permit to include in the form of application such information relating to water quality considerations as may be agreed upon by the licensing or permitting agency and the Administrator.

Subpart B—Determination of Effect on Other States

§ 121.11 Copies of documents.

(a) Upon receipt from an applicant of an application for a license or permit without an accompanying certification, the licensing or permitting agency shall either: (1) Forward one copy of the application to the appropriate certifying agency and two copies to the Regional Administrator, or (2) forward three copies of the application to the Regional Administrator, pursuant to an agreement between the licensing or permitting agency and the Administrator that the Regional Administrator will transmit a copy of the application to the appropriate certifying agency. Upon subsequent receipt from an applicant of a certification, the licensing or permitting agency shall forward a copy of such certification to the Regional Administrator, unless such certification shall have been made by the Regional Administrator pursuant to § 121.24.

(b) Upon receipt from an applicant of an application for a license or permit with an accompanying certification, the licensing or permitting agency shall forward two copies of the application and certification to the Regional Administrator.

(c) Only those portions of the application which relate to water quality considerations shall be forwarded to the Regional Administrator.

§ 121.12 Supplemental information.

If the documents forwarded to the Regional Administrator by the licensing or permitting agency pursuant to § 121.11 do not contain sufficient information for the Regional Administrator to make the determination provided for in § 121.13, the Regional Administrator may request, and the licensing or permitting agency shall obtain from the applicant and forward to the Regional Administrator, any supplemental information as may be required to make such determination.

§ 121.13 Review by Regional Administrator and notification.

The Regional Administrator shall review the application, certification, and any supplemental information provided in accordance with §§ 121.11 and 121.12 and if the Regional Administrator determines there is reason to believe that a discharge may affect the quality of the waters of any State or States other than the State in which the discharge originates, the Regional Administrator shall, no later than 30 days of the date of receipt of the application and certification from the licensing or permitting agency as provided in § 121.11, so notify each affected State, the licensing or permitting agency, and the applicant.

§ 121.14 Forwarding to affected State.

The Regional Administrator shall forward to each affected State a copy of the material provided in accordance with § 121.11.

§ 121.15 Hearings on objection of affected State.

When a licensing or permitting agency holds a public hearing on the objection of an affected State, notice of such objection, including the grounds for such objection, shall be forwarded to the Regional Administra-

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Rule 56. Summary Judgment

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth

specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENTS TO RULES

Note. Subdivision (a). The amendment allows a claimant to move for a summary judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. This will normally operate to permit an earlier motion by the claimant than under the original rule, where the phrase "at any time after the pleading in answer thereto has been served" operates to prevent a claimant from moving for summary judgment, even in a case clearly proper for its exercise, until a formal answer has been filed. Thus in People's Bank v Federal Reserve Bank of San Francisco, ND Cal 1944, 58 F Supp 25, the plaintiff's countermotion for a summary judgment was stricken as premature, because the defendant had not filed an answer. Since Rule 12(a) allows at least 20 days for an answer, that time plus the 10 days required in Rule 56(c) means that under original Rule 56(a) a minimum period of 30 days necessarily has to elapse in every case before the claimant can be heard on his right to a summary judgment. An extension of time by the court or the service of preliminary motions of any kind will prolong that period even further. In many cases this merely represents unnecessary delay. See United States v Adler's Creamery, Inc. CCA 2d, 1939, 107 F2d 987. The changes are in the interest of more expeditious litigation. The 20-day period, as provided, gives the defendant an opportunity to secure counsel and determine a course of action. But in a case where the defendant himself makes a motion for summary judgment within that time, there is no reason to restrict the plaintiff and the amended rule so provides.

Subdivision (c). The amendment of Rule 56(c), by the addition of the final sentence, resolves a doubt expressed in Sartor v Arkansas Natural Gas Corp. 1944, 321 US 620, 88 L Ed 967, 64 S Ct 724. See also Commentary, Summary Judgment as to Damages, 1944, 7 Fed Rules Serv 974; Madeirense Do Brasil S/A v Stulman-Emrick Lumber Co. CCA 2d, 1945, 147 F2d 399, cert den 1945, 325 US 861, 89 L Ed 1982, 65 S Ct 1201. It makes clear that

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LAKE ERIE ALLIANCE FOR THE PROTECTION OF THE COASTAL CORRIDOR, DOWNWIND NEIGHBORS, GEORGE E. LIMBERTY, JOHN MC NICOL LOCAL 1330, UNITED STEELWORKERS OF AMERICA LOCAL 1397, UNITED STEELWORKERS OF AMERICA LOCAL 1462, UNITED STEELWORKERS OF AMERICA TRISTATE CONFERENCE OF THE IMPACT OF STEEL ON OHIO-PENNSYLVANIA-WEST VIRGINIA CONCERNED CITIZENS OF CONNEAUT EARL WEAVER TOM AND MARY MEARA, GERALD SPECHT and CHUCK GAUKEL, Plaintiffs	1.
v.	Civil Action No. 79-110 Erie
U.S. ARMY CORPS OF ENGINEERS CLIFFORD L. ALEXANDER, JR. LT. GEN. JOHN W. MORRIS DANIEL D. LUDWIG GEORGE P. JOHNSON PAUL G. LEDCHNER, Defendants	
and	
U.S.STEEL CORPORATION, Intervenor	

ORDER

AND NOW, this 23rd, day of November, 1981, in accordance with the accompanying opinion,

IT IS ORDERED that plaintiffs' motion for partial summary judgment is DENIED and defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be ENTERED for defendants and the action be DISMISSED and the case be marked CLOSED.

Gerald J. Weber
Chief U.S.District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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LAKE ERIE ALLIANCE FOR THE PROTECTION OF THE COASTAL CORRIDOR, DOWNWIND NEIGHBORS, GEORGE E. LIMBERTY, JOHN MC NICOL LOCAL 1330, UNITED STEELWORKERS OF AMERICA LOCAL 1397, UNITED STEELWORKERS OF AMERICA LOCAL 1462, UNITED STEELWORKERS OF AMERICA TRISTATE CONFERENCE OF THE IMPACT OF STEEL ON OHIO-PENNSYLVANIA-WEST VIRGINIA CONCERNED CITIZENS OF CONNEAUT EARL WEAVER TOM AND MARY MEARA, GERALD SPECHT and CHUCK GAUKEL,

Plaintiffs

v.

U.S. ARMY CORPS OF ENGINEERS CLIFFORD L. ALEXANDER, JR. LT. GEN. JOHN W. MORRIS DANIEL D. LUDWIG GEORGE P. JOHNSON VAUL G. LEUCHNER,

Defendants

and

U.S.STEEL CORPORATION,

Intervenor

) Civil Action No. 79-110 Erie

OPINION

WEBER, Chief Judge

Dated: November 23, 1981

On July 19, 1979, plaintiffs filed a complaint for declaratory and injunctive relief alleging numerous violations of federal laws in connection with the issuance of construction permit No. 77-492-3 granted to United States Steel Corporation (U.S.Steel) by the United States Army Corps of Engineers for the construction of piers in Lake Erie, dredging, the installation of intake and discharge structures into its waters, and diversion of a stream leading into Lake Erie, all in connection with a proposal to construct a steelmill at this site. Plaintiffs are comprised of environmentally concerned organizations, individuals living near the site of the proposed project, unemployed steelworkers and unions affiliated with the United Steelworkers of America. Named defendants include the United States Army Corps of Engineers (the Corps) and five officers of the United States. Jurisdiction is predicated on, inter alia, 28 U.S.C. § 1331(a) and the Administrative Procedure Act, 5 U.S.C. § 701, et seq, (hereinafter the APA). U.S.Steel formally intervened on September 10, 1980.

The case is presently before us on cross motions for summary judgment. Arguments were heard orally before the late William W. Knox, District Judge, on July 1, 1981, and voluminous briefs, reply briefs and appendices have been submitted by both sides, in addition to the draft environmental impact statement (EIS), the final EIS, and portions of the administrative record. Upon the death of Judge Knox, the case was transferred to me, and although I have not been involved with this litigation from its incipiency, nor heard the arguments of counsel, the issues involved and the positions of the parties are presented sufficiently on paper for me to rule on the motions.

Background

On March 2, 1977, at a meeting in Pittsburgh, Pennsylvania, U.S.Steel announced a plan to construct a steelmaking facility on a 2,800 acre site astride the Ohio-Pennsylvania border near Conneaut, Ohio. At the meeting, representatives of U.S.Steel submitted to the Corps an application for a Department of Army Permit authorizing extension of the privately owned East Entrance Pier of Conneaut Harbor, construction of an unloading pier, dredging of an area near the pier, installation of intake and discharge structures in Lake Erie, and diversion and filling of a lower portion of Turkey Creek. At this time U.S.Army Brigadier General Moore designated the Corps, Buffalo, New York District Office, as lead agency for preparation of an EIS for the project.

The Corps immediately assembled a Technical Team composed of representatives of the Corps, the United States Environmental Protection Agency (U.S. EPA) the State of Ohio, the Commonwealth of Pennsylvania, the United States Fish and Wildlife Service, the Federal Regional Counsel, and the National Marine Fisheries Service, to assist in the identification and evaluation of environmental issues, development of on-site sampling studies, and analysis of environmental data used in the EIS. The team was also to provide technical expertise in the areas of air quality, water quality, land use planning, fish and wildlife resource management, and a variety of other related fields. The Technical Team was to evaluate all data furnished to it by U.S.Steel and advise U.S.Steel and its prime consultant, Arthur D. Little Company (A.D.Little), on the types of information necessary to prepare an EIS. To facilitate communications between the Technical Team, U.S.Steel and A.D.Little, representatives of both private companies were invited to sit on the Technical Team.

The Corps issued public notice of the proposed project on March 11, 1977 and commenced a program of meetings, workshops, public hearings, environmental studies, and public comment periods, culminating in the filing of the initial environment assessment by U.S.Steel on July 5, 1978. In response to the environment assessment by U.S.Steel and A.D.Little, the Corps conducted environmental studies, retained consultants, held public meetings, symposiums and workshops, evaluated and addressed public comments, and compiled thousands of documents. These efforts resulted in the draft EIS which the Corps filed as a matter of public record on May 23, 1978. Public comments on it were received for four months thereafter.

The Corps next undertook the production of the final EIS, compiling more studies, holding further public hearings, and receiving additional comments. On April 26, 1979, the Corps submitted the final EIS as a matter of public record. Almost two months later, on June 18, 1979, the Corps issued a construction permit to U.S.Steel. Undergirding the decision of the Corps to issue a permit to U.S.Steel are 42,000 pages of documents, constituting an administrative record more than sixteen feet thick.

One month later, this action was commenced with the filing of a fifty-five page complaint for declaratory and injunctive relief. An amended complaint, of similar substance and length, was filed on November 23, 1979. The amended complaint is in seven counts, comprised primarily of challenges to the adequacy of the final EIS under the National Environmental Policy Act of 1969, §102, 42 U.S.C. §4332, et seq. (NEPA), violations of the Clean Water Act, 33 U.S.C. §1251, et seq., violations of the Fish and Wildlife Coordination Act, 16 U.S.C. §661, et seq., the Migratory Bird Act, 16 U.S.C. §701, et seq., and the APA. Plaintiffs seek a judgment declaring that the EIS on the Lakefront project is inadequate and injunctive relief rescinding permit 77-492-3 until a new EIS is prepared. Plaintiffs also seek injunctive relief rescinding the certification under §401 of the Clean Water Act.

Defendants move for summary judgment on the grounds that the Corps' exhaustive two-year preparation of the EIS and concomitant issuance of permit No. 77-492-3 was completely in accordance with the law and in no way arbitrary, capricious or otherwise an abuse of discretion. Plaintiffs responded to defendants motion with a motion for partial summary judgment and objecting to the entry of summary judgment on all other issues.

Earlier in this litigation while ruling on a discovery motion, the court recognized that its scope of review is limited to the administrative record, unless it appears from the record that inadequate consideration has been given to matters raised. Lake Erie Alliance for the Protection of the Coastal Corridor, et al. v. United States Army Corps of Engineers, et al., Civil Action No. 79-110 Erie (W.D.Pa. Feb. 5, 1981).

The guidelines for our review are more succinctly set forth in Stryker's Bay Neighborhood Council v. Karlen, 444 US 223, 227 (1980) where the Supreme Court reiterated earlier holdings that NEPA imposes upon agencies duties that are "essentially procedural" and cautioned that once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences. The court is not to interject itself within the area of agency discretion. Id. Therefore, the focal point for our review is the administrative record already in existence and not some new record made initially in the reviewing court. Camp v. Pitts, 411 US 138 (1973).

Summary judgment may be properly granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is warranted only on a clear showing that no genuine issue of any material fact remains for trial. Ely v. Hall's Motor Transport Co., 590 F. 2d 62, 66 (3d Cir. 1978). Moreover, the existence of disputed issues of material fact should be ascertained by resolving all doubts against the moving party. Id. However, in light of the limited role of the court in reviewing the administrative record already in existence, this is the type of case which is well suited for summary judgment.

NEPA Issues

Turning to the substantive elements of plaintiffs' claims as they appear in the complaint, the first cause of action alleges that preparation of the EIS violated the requirements of NEPA in numerous instances. Several NEPA violations serve as the basis for distinct counts in the complaint and will be discussed separately. Those which do not can be categorized as environmental concerns. Plaintiffs contend that the consideration given to air quality impacts, solid waste impacts, erosion impacts, water quality impacts, and impacts on land and human resources was "woefully inadequate".

Plaintiffs contend that the air emissions inventory is deficient because U.S.Steel refused to conduct studies which would be required by the U.S. EPA prior to issuing a permit under the Clean Air Act due to prohibitive costs. In addition, inaccuracies in U.S.Steel's baseline air quality data caused the Corps to be "hornswaggled" by the applicant into accepting data which the U.S. EPA later determined to be inadequate. Plaintiffs also allege that defendants failed to discuss the biological effects of air pollution from the operation of the proposed plant and that the Corps tried to "shuffle off" on the U.S. EPA consideration of offsets.

The EIS devotes over 80 pages to studying the effects of the proposed project on the air quality. The statement describes a meteorological and air quality monitoring program which was instituted by Environmental Research and Technology, Inc. to determine baseline air quality at the proposed plant site. The EIS discusses the program in detail, including procedures implemented by the Corps to insure equipment was working properly and that data was accurate. EIS, Vol. II, pp. 2-751, 2-756.

Plaintiffs' contentions that the air emissions inventory is deficient or that the baseline air quality data is inaccurate are insufficient to overcome defendant's motion for summary judgment. The possibility of inaccuracies in data always exists, and despite the rigorous requirements of NEPA, perfection is not required. Environmental Defense Fund v. Tennessee Valley Authority, 492 F. 2d 466 (6th Cir. 1974). 19

NEPA requires an EIS to discuss certain factors in sufficient detail to enable the decision makers to make a reasoned decision. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978). The decision may be a complete blunder as long as it is a knowledgeable one. Matsumoto v. Brinegar, 568 F 2d 1289 (9th Cir. 1978). Plaintiffs' Brief highlights portions of the Administrative Record showing that the analysis concerning air pollution was designed to provide enough information to cover the EIS and to enable the Corps of Engineers to perform its duty under NEPA. Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at page 38. Further, any deficiencies in data were made known to the decision makers, to enable them to make a reasonable decision.

The EIS included a lengthy discussion of primary impacts of facility operations on air emissions and the long-term effects of emissions on human health, vegetation and wild life. See EIS, Vol, III, pp. 4-815 through 4-848. The EIS on its face shows that the plaintiffs' complaints that the Corps failed to adequately discuss the biological effects of air pollution are without merit.

Plaintiffs next challenge the consideration given to solid waste impacts by the Corps. Specifically, they challenge the propriety of adopting the applicants' position that precise sites for waste deposits would be selected at a later time after "more detailed hydro-geologic surveys of prospective areas." Apparently, the Corps should have insisted that U.S.Steel identify the precise areas where waste would be deposited and require the production of detailed studies prior to issuing the permit.

The final EIS, Vol. I, pp. 1-251 through 1-257, discusses each of eight areas identified as potential disposal sites, includes a site map showing their location, and states that seven of them appear capable of handling greater than twice the estimated waste over the life of the plant. Three of the applicants' choices were rejected because they conflicted with the Fish and Wildlife Mitigation Plan developed by the Corps. The EIS assures that during the continued process of selecting a suitable site for waste deposits, the applicant would be required to conform to the site selection and construction requirements set forth in the pertinent statutes. This is sufficient consideration under NEPA.

In addition, plaintiffs allege that the EIS is deficient because no specific erosion control plans were specified. Rather, the Corps estimated the erosion rate and referred to an on-site erosion control program to be developed by the applicant. Also, plaintiffs contend that it should have been made "crystal clear" in the EIS which areas of the site would be exempted from expansion and preserved as wildlife sanctuaries.

NEPA imposes affirmative obligations on an agency to seek out information concerning environmental consequences, but does not specify the quantum of information that must be in the hands of the decision maker before he decides to issue a permit. Alaska v. Andrus, 580 F. 2d 465 (D.C. Cir. 1978), vacated in part on other grounds, 439 U.S. 922 (1979). The EIS is to provide the decision maker with a detailed and careful analysis of the relative environmental merits and demerits of proposed action. It does not impose a requirement of perfection, nor does it require that all environmental impacts be known. Environmental Defense Fund, Inc. v. Costle, 439 F. Supp. 980 (E.D. N.Y. 1977).

Despite divergent population projections and a consensus recommendation that an alternative to the A.D.Little population study be presented, plaintiffs complain that the Corps accepted the A.D. Little study with no independent evaluation. Therefore, insufficient consideration was given to impacts of the plant on human resources.

The EIS does not support plaintiffs' position. A substantial part of Chapter 4 is devoted to the impact of the plant on the human environment. More specifically, population projections and the effects of population increases on a myriad of factors including, inter alia, housing, school systems, sewage systems, law enforcement, fire protection, property taxes, property evaluations, electricity demands, natural gas demands, etc. are considered in relation to both Pennsylvania and Ohio. EIS, Vol. III, pp. 4-1 through 4-510. Careful study of the EIS, especially Volume III, pages 4-103 through 4-106, indicates that the plaintiffs' contentions are without merit. The Corps acknowledges that population studies are speculative at best and that different statistics were received from different sources. A number of governmental agencies submitted independent population projections to the Corps differing from the private study received from A.D.Little. In an attempt to meet this criticism and present the reviewer with some perspective on the different figures offered by the various plans and studies, the EIS includes a chart with multipliers which can be used to estimate the range of possible effects of population growth from the plant.

The plaintiffs' final environmental criticism of the EIS is that it inadequately considered construction and operation impacts of the plant on water quality. To the extent that the argument advanced in plaintiffs' briefs are not covered elsewhere in this opinion, we need only cite to the EIS, Vol. III, pp. 4-643 through 4-808 to support defendants' position that the environmental impact statement is adequate in its consideration of impacts on water quality.

Plaintiffs are of the opinion that summary judgment is inappropriate on each of these environmental issues because there are genuine issues of material fact in dispute as to the adequacy of the Corps' consideration. Plaintiffs offer nothing specific to indicate what facts are in dispute. The record clearly reveals what the Corps did and did not do during the permitting process in its consideration of each issue raised. Reviewing that record to determine the adequacy of their consideration is strictly a legal matter within the province of the court. Having done so, we are satisfied from the record that the defendants adequately took into consideration the impact of the plant on air, land and water quality as well as human resources.

Plaintiffs true complaint is that the conclusion reached by the defendants was contrary to the conclusion that plaintiffs would have reached. While we are sympathetic with the concerns of the plaintiffs, the Supreme Court has left little doubt as to the role of the courts in reviewing the sufficiency of an agency's consideration of environmental factors. Vermont Yankee Nuclear Power Corp., v. NRDC, supra. "Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions." Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976). NEPA imposes upon agencies duties that are essentially procedural and the Act was designed to insure a fully-informed and well-considered decision, but not necessarily one which the judge or judges of the reviewing courts would have reached had they been members of the decision making unit. Strvckers Bay Neighborhood Council, Inc. v. Karlen, supra.

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Once an agency has made a decision subject to NEPA's procedural requirements, the court is only to insure that the agency has considered the environmental consequences and is not to interject itself within the area of the discretion of the executive as to the choice of the action to be taken. Id. at 227-228. Further, the only procedural requirements proposed by NEPA are those stated in the plain language of the Act. Kleppe v. Sierra Club, supra, at 405-406. NEPA requires that the agency shall "include in every recommendation or report on proposals. . . significantly affecting the quality of the human environment a detailed statement by the responsible official on . . . the environmental impact of the proposed action." 42 U.S.C. §4332(2)(C)(i).

The detail must be sufficient to show that the agency made a good faith effort to consider the values NEPA seeks to protect by cataloguing environmental factors and explaining fully the agency's course of inquiry, analysis and reasoning. Philadelphia Council of Neighborhood Organizations v. Coleman, 437 F.Supp. 1341 (E.D. Pa. 1977) aff'd without opinion, 578 F. 2d 1375 (3d Cir. 1977). 24

The Administrative Record and the Environmental Impact Statement more than adequately demonstrate compliance with NEPA and therefore summary judgment will be entered for the defendant as to each of these environmental matters.

Alternatives

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Plaintiffs' second cause of action charges defendants with violating NEPA by failing to adequately examine alternatives to the proposed plant. Cross motions for partial summary judgment on this issue were denied earlier by the Judge W. Knox because the record at that time was incomplete. Lake Erie Alliance for the Protection of The Coastal Corridor, et al. v. U.S.Army Corps of Engineers, et al., Civil Action No. 79-110, (W.D. Pa. Sept. 10, 1980). Since that time, the record has been clarified and augmented and is now in a posture for entry of summary judgment. Plaintiffs reverse their earlier position that there are no material issues of fact in dispute on the alternatives issue and urge the court to deny defendants' motion for summary judgment on this question because their experts disagree with the defendants' experts on the viability of alternative sites. However, disagreement among experts, even if proven after a full trial on the merits, would not serve to invalidate the EIS. Life of the Land v. Brinegar, 485 F. 2d 460, 472, (9th Cir. 1973), cert. denied 416 U.S. 961 (1974). The purpose of the EIS is to inform the decision makers of the environmental ramifications of the proposed action and the statement need not achieve scientific unanimity. Id.

Plaintiffs' main contention is that the analysis of alternatives presented in the EIS is deficient since it did not include a study of partial alternatives. Instead of one large plant, plaintiffs suggest that building two smaller plants, or expanding existing plants and constructing a smaller Greenfield one at Conneaut is both reasonable and feasible. They further argue that the EIS is fatally flawed because the Corps failed to make an objective inquiry into the total cost of the proposed project or to review cost studies performed by others.

NEPA directs that all agencies of the federal government shall "include in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment a detailed statement by the responsible official on . . . alternatives to the proposed action" 42 U.S.C. §4332(2)(C)(iii).

Federal regulations consider the comparison of alternatives to a proposed action to be at the "heart of the environmental impact statement". 40 C.F.R. §1502.14 (1980). However, NEPA's requirement that alternatives be studied, developed and described is subject to a rule of reason. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. at 551. The Supreme Court has recognized that the impact statement must be bounded by some notion of feasibility. Id. Accordingly, numerous courts have held that there is no need for an EIS to consider an alternative whose effect cannot reasonably be ascertained and whose implementation is deemed remote and speculative. NRDC v. Morton, 458 F. 2d 827, 838 (D.C. Cir. 1972); Fayetteville Area Chamber of Commerce v. Volpe, 515 F. 2d 1021 (4th Cir. 1975), cert. denied, 423 U.S. 912; Committee for Nuclear Responsibility Inc. v. Seaborg, 463 F. 2d 783, 787 (D.C. Cir. 1971). 26

The EIS devotes 130 pages to the consideration of alternatives to the proposed project. These alternatives include no action, rearrangement of plant layout, alternative process units, alternative plant operation concepts, alternative sites, alternative processes, alternative ancillary facilities, alternative solid waste management systems, alternative operation and maintenance methodologies, alternative intake and discharge systems, alternatives to the original proposal to fill and divert Turkey Creek, and alternative pier extension and dock design. Alternative "Brownfield" sites in Chicago, Illinois, Gary, Indiana, Youngstown and Lorain, Ohio were considered. Greenfield sites along the Great Lakes Shoreline in Indiana, Illinois, New York, Ohio and Pennsylvania were studied. All were rejected because the Corps determined that, although feasible for some degree of industrial expansion, they offered no advantage over the Conneaut site due to social, economic and envionmental problems. EIS, Vol. IV at 6-69.

According to the administrative record before us, there is nothing to indicate that plaintiffs, or anyone else, forcefully brought such partial alternatives to the attention of the defendants during the compilation of the draft or the final EIS. However, the impact statement does indicate that partial alternatives were considered but the Corps did not find them preferable socially, economically or environmentally. Taken together with the fact that U.S.Steel did not want to modernize, add on, or build two small plants, this alternative now pressed by the plaintiffs could hardly be considered anything other than remote or speculative and we believe that under the rule of reason, the brief statement concerning partial alternatives in the EIS is adequate. Philadelphia Council of Neighborhood Organizations v. Coleman, 437 F.Supp. 1341, 1365 (E.D. Pa. 1977). The agency need not ferret out every possible alternative but must only consider those which are forcefully presented and bounded by some notion of feasibility. Vermont Yankee Nuclear Power Corp. v. NRDC, supra. The administrative record convincingly shows that the Corps gave reasonable consideration to a large number of alternative sites and potential methods for U.S. Steel to meet its needs of future expansion. Having done so, it has satisfied NEPA's procedural mandate on this issue.

Delegation Issues

Plaintiffs allege in the third cause of action that the presence of U.S.Steel and its consultant, A.D. Little, on the Technical Team was an improper delegation of the agency's responsibilities. They argue that the team relied on factually unsupported statements by U.S.Steel during the preparation of the EIS and therefore the Corps abdicated its primary and nondelegable duty by substituting the applicant's evaluations for its own. Plaintiffs contend that this issue is not proper for summary judgment yet point to no specifics to support their position. 28

Under the provisions of NEPA, the federal official charged with implementing the provisions of the Act remains responsible for the scope, objectivity and content of the EIS. 42 USC §4332(2)(D)(iii). This requirement is to insure that the final EIS will not be based upon self-serving assumptions submitted by the applicant. Green County Planning Board v. Federal Power Commission, 455 F. 2d 412, 420 (2d Cir. 1972), cert. denied, 409 U.S. 849 (1973). Both the guidelines of the Council on Environmental Quality (CEQ) and the Corps' own regulations specifically allow an agency to rely on an applicant for environmental data. See, 40 C.F.R. §1500.7; 33 C.F.R. §209.410(e)(8).

According to the final EIS, it became apparent during the review of the U.S.Steel permit application that a multidisciplinary evaluation would be required to identify and define the environmental impacts associated with the construction and operation of the proposed steel mill. In order to perform such an evaluation, the Corps decided to bring together representatives from a number of state and federal agencies with specialized expertise in the various technical disciplines. To facilitate communication and avoid duplication of efforts, U.S.Steel and A.D.Little were invited to sit in on the Technical Team.

Plaintiffs concede that there is nothing inherently improper or illegal with the technical team concept or in coordinating information with the permit applicant. Plaintiffs do not agree, however, that the applicant should be seated as a member of the Technical Team and argue that its intimate involvement at the policy-making level tainted all actions of the inter-agency team. They complain more specifically that the Corps did not independently verify crucial information, that nearly 80% of the first two chapters of the final EIS were adopted verbatim from the A.D. Little report, and that the Corps requested the applicant to respond to approximately 60% of the comments received on the draft EIS. 29

Nothing in NEPA or the regulations says that the agency cannot adopt a report furnished by the applicant in whole or in part. The Act only requires that the defendants take responsibility for the scope and content and make their own evaluation of the environmental issues. It need not be entirely the Corps' own work product. Sierra Club v. Lynn, 502 F. 2d 43, (5th Cir. 1974). In the absence of bad faith or misplaced reliance, an agency cannot be expected to ignore useful and relevant information merely because it emanates from an applicant. Id. While this does not mean that the agency may substitute the applicant's analysis for its own, a duplication of effort would be a needless waste of government time and money. The procedure followed by the Corps ensured that they maintained control over how the information was to be received from the applicant and, if the agency determined it to be appropriate, incorporated in the EIS. See Appendix to Plaintiffs' Brief, Vol. 4 at 138-140.

The final EIS indicates that hundreds of letters were sent out to both private and public agencies requesting comments on the draft EIS. These letters and responses comprise nearly 200 pages in the EIS. After extending the period for reviewing the draft EIS and receiving public comments by an additional 45 days, the agency requested that U.S.Steel aid in preparing responses to the numerous comments that had been received. In a letter dated September 18, 1978, Col. Daniel D. Ludwig solicits the aid of Stephen P. Curtiss of U.S.Steel, in responding to comments, stating that, "[m]y staff will evaluate each response to insure that it is suitable for inclusion in the final EIS. In addition, your response will be forwarded to the reviewing agencies for evaluation and concurrence. Those responses deemed unacceptable by my staff or agency officials will be returned to you for further input." Colonel Ludwig also states that "[t]he final environmental impact statement will not be issued until I am fully satisfied that all primary and secondary impact issues, alternatives, monitoring proposals and on-site mitigation matters have been adequately addressed." Appendix to Plaintiffs' Brief, Vol. 4, at 152. 30

We are satisfied that the Corps met its obligations under NEPA to independently and objectively evaluate all studies and data. The record indicates that reports received from A.D. Little were reviewed by numerous agencies including the Corps of Engineers, that the data and conclusions contained in the draft EIS were scrutinized for validity and accuracy during the formal public interest review period, that additional studies were carried out in response to these comments and that the final EIS was more than a collation of comments and self-serving statements supplied by the applicant.

Violations of Sections 401 and 404 of the Clean Water Act

The next cause of action in the complaint alleges three violations of the Federal Water Pollution Control Act, commonly known as the Clean Water Act, 33 U.S.C. §1251, et seq. The first violation alleged is that U.S.Steel failed to obtain a valid Section 401 certification from the State of Ohio. Section 401 of the Clean Water Act requires an applicant for a federal license to conduct any activity, including the construction or operation of facilities which may result in discharge into navigable waters, to provide the licensing agency with a certification from the state in which the discharge originates. 33 U.S.C. §1341(a)(1). U.S. Steel obtained a 401 certification from the State of Ohio on May 4, 1979, and a subsequent certification was reissued on June 19, 1979, to clarify the earlier one. Plaintiffs contend that this certification was invalid.

On January 30, 1980, Judge Knox dismissed plaintiffs' complaint against James McAvoy, Director of Ohio Environmental Agency, and the Ohio Environmental Protection Agency for lack of venue. Subsequently, plaintiffs filed a similar action against the Ohio defendants before the Ohio Environmental Board of Review (OEBR).

The OEBR considered de novo plaintiffs' allegations that the 401 certification from Ohio was invalid and found in favor of the director of the Ohio EPA on every issue. Lake Erie Alliance v. McAvoy, Case No. EBR 79-63 (January 4, 1980). The decision of the OEBR was affirmed by the Court of Appeals of Franklin County, Ohio, _____Ohio App. 2d_____, (Aug. 28, 1980), cert. denied, ____ Ohio St. 2d _____, (Dec. 31, 1980). Defendants contend that the decision of the Ohio courts that the section 401 certification in question is both reasonable and lawful, is res judicata and may not be challenged in this court. 32

Res judicata makes conclusive a final valid judgment, and if the judgement is on the merits, precludes further litigation of the same cause of action by the parties. Antonioli v. Lehigh Coal and Navigation Co., 451 F. 2d 1171, 1196 (3d Cir. 1971), cert. denied, 406 U.S. 906 (1972). In the Ohio case, there was substantial identity of the parties, or those in privity with them, with those of the instant action and there is no question but that the Ohio decision was a final one on the merits. Plaintiffs contend that res judicata does not apply here since the OEBR declined to consider whether the 401 certification satisfied the federal EPA regulations.

On the contrary, both the administrative board and the appellate courts considered the question and decided that in issuing a 401 certification, the director of the Ohio EPA is not bound by the regulations of the U.S. EPA or any other federal agency. To the extent that this particular question may raise federal issues, we agree with the finding of the Administrative Review Board and the Ohio Court of Appeals that the state certification under the Clean Water Act is set up as the exclusive prerogative of the state and is not to be reviewed by any agency of the federal government. 33 U.S.C. §1371(c)(2). See Mobil Oil Corp. v. Kelley, 426 F.Supp. 230, 234-235 (E.D. Ala. 1976). In all other respects we conclude that plaintiffs are barred from relitigating the validity of the 401 certification by the doctrine of res judicata.

Plaintiffs next argue that the Corps' issuance of permit No. 77-492-3 was unlawful because U.S.Steel did not obtain a 401 certification from the Commonwealth of Pennsylvania. It is their position that U.S.Steel is obligated to apply for and obtain a 401 certification from Pennsylvania as one of the states in which the discharge into the navigable waters of the United States will originate. This argument appears to be an afterthought since in the amended complaint plaintiffs argue only that Pennsylvania must be notified as a state whose water quality may be affected by the discharge in question and given 60 days to file objections or proposed permit conditions. The Clean Water Act requires that "any applicant for a Federal . . . permit to conduct any activity. . . which may result in discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the state in which the discharge originates or will originate. . . ." 33 USC §1341. 33

Plaintiffs' first contention is that certain operations of the plant located in Pennsylvania will generate water pollutants which will end up in navigable waters of Pennsylvania and that discharge pipes will be located almost on the state line. Therefore, the plant discharge will originate in Pennsylvania where one-half the facilities are located and because the plant discharges will affect Pennsylvania waters, a Pennsylvania certification is required. This position has specifically been rejected by the U.S. EPA. In an opinion issued by the General Counsel, the agency stated that when a facility is located in one state and has the end of a discharge pipe within the waters of another state, the applicant must only get a 401 certification from the state in which the facility is located and not from the state where the discharge pipe is located. U.S. EPA, General Counsel Opinion (No. 78-8), emphasis added.

Plaintiffs next contend that the final EIS lists Raccoon Creek, a Pennsylvania stream, as one of the surface waters which will receive and discharge pollutants. Therefore, discharge will originate in Pennsylvania necessitating a 401 certification from that state. The final EIS, Vol. III, at pp. 4-643, does list Raccoon Creek as one of the surface waters which would be adversely affected during construction, but nowhere is it indicated that discharge would "originate" there. Origination of discharge is a touchstone requiring a 401 certification from a state and there is no evidence in the administrative record that any discharge will originate in Pennsylvania. Therefore, no such certification is required. Further, we note that the representatives of the Commonwealth of Pennsylvania and the Pennsylvania Department of Environmental Resources took part in the development of the final EIS and apparently agreed that there was no need for Pennsylvania to issue a 401 certification. 34

Plaintiffs' further complain that the defendants failed to comply with the referral procedures set forth in the Clean Water Act. 33 U.S.C. §1341(a)(2). Section 401(a)(2) provides in pertinent part as follows:

> Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within 30 days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and within such sixty-day period notifies the Administrator... or permitting agency in writing of its objection to the issuance of such license or permit and request a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. . . .

Defendants admit that the Corps did not formally notify the Administrator of the U.S. EPA of receipt of the purported 401 certificate from Ohio. Defendants contend, however, that only actual notice is required and that since two regional administrators of the U.S. EPA were members of the Technical Team and were kept informed of all relevant activities at every stage of the preparation of the EIS, the notice requirement was satisfied.

The purpose of the notice requirement is to enable a state whose water qualities may be affected by the proposed federal activity an opportunity to insure that its standards will be complied with. As defendants pointed out, the interagency Technical Team was represented by the Administrator of the U.S. EPA for Regions III and V, Staff Director of the Federal Regional Council for the U.S. EPA for Region III, the Governor of Pennsylvania, representatives of the applicant and representatives of the Pennsylvania Department of Environmental Resources. The record is replete with references to the exchange of information between the federal and state representatives. Under the statute, if a state objects, it has the right to request in writing that a public hearing be held on its objections. There is nothing to indicate that such written objection was given, although it appears clear that Pennsylvania was aware of the proposed plan. In their brief, plaintiffs express concern that without receiving formal

notice, the legal rights of the government and citizens of Pennsylvania, including the right to challenge the Administrator's decision not to refer the matter to Pennsylvania, would not be safeguarded. This concern is unwarranted. Maurice Goddard, Secretary of the Pennsylvania Department of Environmental Resources, indicates in a letter to Colonel Daniel Ludwig that: "Generally, the U.S.Steel proposals to protect water quality with regard to plant discharges are acceptable." EIS, Vol. IV, p. A-145. In addition, the compilation of letters and comments from individuals and groups in Pennsylvania illustrates convincingly that the legal rights of the Pennsylvania government and its citizens were adequately safeguarded.

Inadequacies of the EIS

The next series of allegations involve shortcomings in the EIS itself. Plaintiffs allege that defendants failed to adequately consider the environmental impacts of a purportedly integral project by the Pittsburgh and Conneaut Dock Company ("P&C"), by failing to consider a treaty between the United States and Canada, by giving inadequate consideration to effects of the project on the wetlands or to the effects of the culverting of Turkey Creek and by failing to supplement the EIS when conditions changed.

Pittsburgh & Conneaut Dock Company 37

Plaintiffs suggest that the dredging activities and expansion of facilities by the P&C, a subsidiary of U.S.Steel located in the Conneaut harbor adjacent to the proposed lake front steel project, are an integral part of the proposed steelmill and the EIS should have considered in greater detail the environmental effects of such an expansion. U.S.Steel, P&C and the Corps have consistently stated that the present expansion of the raw material handling facility and concomitant dredging activities are not related to the lake front steel plant.

In response to a comment by the Conneaut Ad Hoc Committee, the Corps explained:

> The activity currently underway adjacent to the proposed steelmill site is totally independent of the proposed mill project and deals solely with expansion of a coal facility and water pollution control program of the Bessemer and Lake Erie Railroad and the Pittsburgh and Conneaut Dock Company. Coal facility expansion is a separate project designed to provide coal to power plants in Ontario. The above activity is neither related to the proposed Lakefront Plant nor applicable to the analysis of primary environmental impacts." EIS, Vol 4, p. 9-52. See also, EIS, Vol. II, p. 2-539.

The EIS indicates that plans provide for the future expansion of P&C facilities to accommodate the raw materials requirement for the proposed steel project. EIS, Vol. I, p. 1-118.

The interrelation between the two projects concerning raw materials handling and storage was considered in the EIS generally in Volume I at pages 118 through 139 and more specifically as follows: concerning its effects on port traffic in the Conneaut Harbor at EIS, Vol 2, pp. 2-530 through 2-540; concerning surface water runoff and waste water treatment at EIS, Vol. 3, pp. 4-768 through 4-770, and 4-941; and concerning airborne emissions relating to the handling and storage of raw materials at the P&C facilities at EIS, Vol. 1, p. 1-142.

The EIS supports the Corps' conclusion that expansion of the P&C to provide raw materials and storage services to the proposed lake front steelmill is likely, and to that extent any additional environmental consequences resulting from the two projects were taken into consideration before issuing a permit to U.S.Steel. This is all that is required under NEPA. Since it does not appear from the record that inadequate consideration was given to this matter, we find no reason to interfere in the discretionary duties of the Army Corps of Engineers.

Great Lakes Water Quality Agreement of 1978

Plaintiffs seek summary judgment against the defendants for failure of the Corps to consider or give any weight to the requirements of the Great Lakes Water Quality Agreement of 1978. (App. to Plaintiffs' Brief, Vol, 1, at 180). The Great Lakes Water Quality Agreement of 1978 is an executive agreement signed by Cyrus R. Vance, Secretary of State, on behalf of the United States and by the Government of Canada to restore and maintain the chemical, physical and biological integrity of the Great Lakes Basin Eco System by prohibiting the discharge of toxic substances in toxic amounts. It provides that a plan for the virtual elimination of discharges of persistent toxic substances into the Great Lakes System must be completed and in operation not later than December 31, 1983.

NEPA requires that all agencies of the federal government shall "recognize the worldwide and longrange character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment." 42 U.S.C. §4332(2)(F). The regulations of the Corps also indicate that international impacts and factors should be discussed in the EIS. 33 C.F.R. §209.410(i)(6)(ii).

Defendants view the Great Lakes Water Quality Agreement as an executive one, requiring Congressional action to authorize funds implementing its programs. They interpret its general objectives of "eliminating or reducing to the maximum extent practicable the discharge of pollutants" to be bounded by "practicability" as suggested in the specific objectives of the Agreement. The defendants contend that the Corps fully considered the predecessor 1972 Agreement in the draft EIS and the substantially identical 1978 Agreement in the final EIS. Defendants also argue that the Corps permit only covers construction of water intake and discharge systems and other activities preliminary to the construction of the proposed mills and that the effluent discharges may be permitted only by the U.S. EPA or the state during the NPDES permit process.

Since plaintiffs are not attempting to enforce the terms of the Agreement, it is not necessary to interpret its language. The plaintiffs only have standing to complain that defendants violated NEPA by failing to consider the Agreement during its decision making process. A memorandum from general counsel to the U.S. EPA indicates that "[a]lthough the agreement does not override federal law and is not legally binding within U.S. boundaries, it does represent a commitment of the U.S. to fulfill its terms. Consequently, the Agreement must be considered in formulating federal policies and in making responsible decisions within the federal government." Annex to Government Consolidated Reply Brief, p. 96.

The 1978 Agreement was discussed briefly in the final EIS. In a response to comments received during the review process of the draft EIS the Corps stated:

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[t]he comments correctly state that the new 1978 Agreement places strong focus on cooperative and individual efforts to control the discharges of 'toxic substances' and other pollutants to the Great Lakes. One portion of the Agreement (Annex 10) requires that the parties maintain a list of pollutants known or suspected to have adverse affects on the lake's biota and a risk of being discharged. The parties further have agreed to: 'develop and implement programs and measures to minimize or eliminate the risk of release of hazardous polluting substances to the Great Lakes System'.

The draft statement did include several sections (4-503 to 4-516) which discussed in depth the chemicals that were expected to be in the proposed plant's discharge. A refined list could only be prepared from analyses of the actual effluent once the plant is in operation. By that time it is possible that the parties will have developed specific regulations -- relating to the 'programs and measures' referred to above which could require some action on the part of the applicant.

The 1978 Agreement (in Annex I) also formally adopted specific objectives for numerous chemical, physical, microbiological, and radiological parameters or pollutants. These recent objectives are, with two exceptions, the same as those listed in Table 2-338 of the draft statement which is a comparison of water quality criteria for Lake Erie relative to substances proposed for Lakefront Plant discharge. The two exceptions are: cadmium, for which the objective is 0.0002 mg/l and phenols, for which the objective is 0.001 mg/l. Except for the cadmium objective, these IJC objectives differ little or not at all from legally enforceable water quality standards currently in effect in the State of Ohio. Ohio's standard for cadmium is 0.0012 mg/l. It should be noted the current levels of cadmium in Lake Erie waters near the project site are typically about 0.001 mg/l with some values up to 0.005 mg/l, as indicated in Tables 4-286 and 4-287 of the Draft EIS. Additionally, the analysis of known effects of cadmium on aquatic life as presented in Chapter Four of the Draft EIS concluded that 'predicted concentration of cadmium, even in the effluent itself, are generally below the reported effects levels. . .' EIS, Vol IV, p. 9-116

This response indicates that the Corps did review the terms of the Agreement and take them into consideration in preparing the draft and final impact statements. NEPA does not specify how much weight should be given to such international factors, requiring only that the agency "recognize" and "lend appropriate support" to programs designed to prevent a decline in the quality of world environment. 42 U.S.C. §4332(F). The final EIS indicates compliance with this section of NEPA.

Wetlands

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Plaintiffs submit that the Corps' analysis of the wetland communities in the EIS is grossly inadequate and misleading. They argue that the Corps' own regulations, as well as guidelines of the U.S. EPA, require careful consideration be given to preserving wetlands and that the EIS indicates that the only consideration given was cursory and insufficient to enable Colonel Ludwig to make a knowledgeable decision on this important environmental resource.

On the contrary, the EIS devotes considerable attention to the wetlands, swamps, marshes, boggs and similar areas saturated by water. The EIS describes the areas geographically, biologically, ecologically and other ways the court has never heard of before. 1/ See EIS, Vol. II, pp. 2-987, 2-995, 2-996, 2-1028 through 2-1033; Vol. III, pp. 4-808, 4-818, 4-845; Vol IV, pp. 5-35, 5-36. There is more than adequate information included in the EIS to enable Colonel Ludwig to take the wetlands into consideration in reaching his decision. Once again, it appears that the plaintiffs are unhappy with the final decision rather than the procedural manner in which it was reached.

1/ The court is not unfamiliar with the area, having spent time in the Summers of his boyhood at a Boy Scout Camp in the immediate vicinity of the proposed plant, and having spent a lifetime in the county of Pennsylvania where the plant is to be located, paying some particular attention to the activities of the aquatic life off shore.

Culverting of Turkey Creek

Count One of the amended complaint alleges that the Corps significantly changed the project between the publication of the draft EIS and the final EIS by deciding to culvert rather than divert Turkey Creek without amending the draft EIS and circulating it to the governmental agencies and the public for comment as required by NEPA. Count Six charges additional violations of Sections 401 and 404 of the Clean Water Act and violations of the Civil Rights Act, 42 USC Section 1983, in connection with the culverting of Turkey Creek. The complaint alleges that this is subject to the common law and statutory rights of the plaintiffs to use and have access to Turkey Creek as a navigable stream. In their brief and reply brief, plaintiffs argue only the former point and appear to have abandoned their position that Turkey Creek is a navigable stream. 42

Plaintiffs urge us to order defendants to amend the draft EIS and allow for public comment on the culverting of Turkey Creek according to the procedure required in the Corps' regulations. The regulations are drafted to insure that environmental information is made available to citizens before decisions are made and to encourage public involvement in agency decisions. 40 C.F.R. §1500(b); 1500.2(b) and (d). More specific regulations concerning the inviting of public comments provide as follows:

> Section 1503.1 Inviting comments.
>
> (a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement, the agency shall: . . .
> (4) Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.
>
> (b) An agency may request comments on a final environmental impact statement before the decision is finally made. In any case other agencies or persons may make comments before the final decision unless a different time is provided under Section 1506.10. 40 C.F.R. §1503.1.

Plaintiffs concede that they were aware that the culverting of Turkey Creek was mentioned as a possibility a number of times in area newspapers from October, 1978, through February of 1979. However, they argue that the public was not made aware that U.S.Steel had definitely decided to abandon the diverting options until the final EIS was issued and therefore the Corps did not insure the fullest public participation at the earliest time as required by the regulations.

The regulations are not specific as to what kind of notice is required, but their purpose is to invite public comment prior to the final decision. Plaintiffs' briefs and appendices in support thereof indicate that the plaintiffs had an opportunity to comment on the plans for Turkey Creek as laid out in the final EIS prior to the final decision by the Corps of Engineers. Even if the Corps did, as plaintiffs contend, "frustrate the purpose and letters" of the regulations, plaintiffs, and others, corrected any frustration by offering their views to Colonel Ludwig on the propriety of culverting Turkey Creek prior to his final decision. Nothing would be accomplished by ordering a rewrite of the voluminous draft and final impact statements just so defendants could have the benefits of plaintiffs' views once again.

Nor is it necessary for the Corps of Engineers to supplement the draft EIS due to changes in the project. The Corps is under a continuing duty to gather and evaluate new information relative to the environmental impact of its actions. 42 U.S.C. §4332(2)(A), (B). Regulations require supplements to be prepared if "the agency makes substantial changes in the proposed action," or if "significant new circumstances or information" bearing on the environment surface. 40 C.F.R. §1502.9(c). The decision of the agency not to supplement an EIS will be upheld if it is reasonable. Warm Springs Dam Task Force v. Gribble, 621 F. 2d 1017 (9th Cir. 1980).

There is no indication that the defendants' decision to abandon its diverting options as suggested in the draft EIS and choose the culverting option in the final EIS was based on inaccurate or insufficient environmental information. In fact, defendants contend that the culverting of Turkey Creek will actually lessen the severity of adverse impacts on the environment and plaintiffs do not refute this. In addition, plaintiffs concede that this possibility had been discussed initially and debated continually throughout the process of compiling both impact statements. Based on this, there is nothing to indicate that the position taken in the final EIS was such a "substantial change" based on "significant new circumstances or information" as to require an amended draft EIS. Nor does it appear that the defendants' decision not to supplement the statement was unreasonable.

Fish and Wildlife Coordination Act and the Migratory Bird Act.

Count Five of the complaint alleges that the defendants drew up the draft and final impact statements and issued the permit to U.S.Steel in violation of the Fish and Wildlife Coordination Act of 1934, 15 U.S.C. §661, et seq., the Migratory Bird Act, 16 U.S.C. §701, et seq. and the Corps' regulations. The Fish and Wildlife Coordination Act is intended to encourage cooperation between the Secretary of the Interior and other federal, state and public or private agencies in conserving wild life resources while expanding the national economy. 16 U.S.C. §661. The Act requires that:

> (a) . . .[w]henever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, . . . by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed with a view to the conservation of wildlife resources and preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development.

> (b) . . . In furtherance of such purposes, the reports and recommendations of the Secretary of the Interior on the wildlife aspects of such projects. . . shall be made an integral part of any report prepared or submitted by any agency of the Federal Government reponsible for engineering surveys and construction of such projects when such reports are presented to the Congress or to any agency or person having the authority. . . to authorize the construction of water-resource, development projects. . .. The reporting officers in project reports of the Federal agencies shall give full consideration to the report and recommendations of the Secretary of the Interior and to any report of the State agency on the wildlife aspects of such projects, and the project plan shall include such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits. 16 U.S.C. §662.

The Corps' regulations reiterate the requirement that they consult with the Regional Director, U.S. Fish and Wildlife Service and the head of the state agency responsible for fish and wildlife and give great weight to their views in evaluating the application. The regulations provide that the applicant will be urged to modify his proposal to eliminate or mitigate any damage to such resources, and in appropriate cases a permit may be conditioned to accomplish this purpose. 33 C.F.R. §320.4(c)

Plaintiffs argue that this Act was violated because defendants ignored State and Federal agency requests that the final EIS definitively display in maps the areas of the plant site which will remain completely undeveloped. The fact that the defendants issued the permit and refused to withdraw it despite the recommendations of the U.S. Fish and Wildlife Service and the Pennsylvania Agencies is a violation of the Fish and Wildlife Coordination Act according to the plaintiffs.

Plaintiffs do not consider this issue proper for summary judgment since there is a dispute as to whether the U.S. Fish and Wildlife Service supported the wildlife management plan developed by a private consulting firm. This dispute is not critical to the question of whether the defendants consulted with the Secretary of the U.S. Fish and Wildlife Service, with the head of the appropriate state agencies, made their reports an integral part of the Corps report, and gave their reports and recommendations full consideration as required by the Act.

The EIS indicates that the statutory and regulatory procedures were followed. There is no requirement that the Corps follow the advice of the State or Federal agencies or adopt their positions. Plaintiffs are arguing that the final decision was wrong because a Pennsylvania agency recommended against it. Review of the merits of the agency's proposed action is not required by NEPA. One circuit court has stated that "[t]he project, when finished, may be a complete blunder -- NEPA insists that it be a knowledgeable blunder." Matsumato v. Brinegar, supra.

The administrative record and the final EIS support defendants positions that they did not violate either the Fish and Wildlife Coordination Act or the Migratory Bird Act. See, Administrative Record, Vols. 1, 2 and 3; EIS, Vol. II, pp. 2-991 through 2-1071; EIS, Vol. III, pp. 4-838, 5-61, and 6-120 through 6-129. Representatives of federal and state fish and wildlife organizations were consulted early in the review process and contacts were maintained throughout the permitting process. The end result of all these consultations was the development of the fish and wildlife management plan for the lakefront site by the consulting firm of Fahringer, McCarty, Grey, Inc. Administrative Record, Vol. 113. The U.S. Fish and Wildlife Service and the Ohio Department of Natural Resources wholly supported the Wildlife Management Plan developed by Fahringer, McCarty & Grey, Inc. All fish and wildlife resource agencies except the Pennsylvania Fish and Game Commissions agreed that the effect of culverting Turkey Creek culvert upon fish and wildlife would be minimal.

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The fact that the Pennsylvania Game and Fish Commission opposed issuance of the permit does not mean that the Corps did not give "full consideration" or "great weight" to the views of that agency. It only shows that they gave greater weight to the views of the majority of the agencies and experts which studied the effects the plant would have on wildlife.

CONCLUSION

Plaintiffs have persistently and diligently attacked the final environmental impact statement from every conceivable angle. Defendants have steadfastly stood behind their decision to issue the permit and support their motion for summary judgment with the four corners of the impact statement and the administrative record. In an effort to comply with the applicable standards of review, the court has conducted a thorough and in-depth review of the record to determine whether the agency action is in accord with NEPA and the APA. While we have been impressed with the conscientious efforts of plaintiffs to ferret out every possible procedural deficiency during this two-year process, we have been even more impressed with the good faith efforts of the Army Corps of Engineers.

In order to successfully oppose the defendants' motion for summary judgment, plaintiffs must "set forth specific facts showing that there is a genuine issue for trial." Tunnel v. Wiley, 514 F. 2d 971 (3d Cir. 1975). Despite protestations from the plaintiffs, our studies indicate that the instant case is not one which presents conflicting factual instances of a material nature, nor is it a case where credibility is an important factor. In addition, our review focused on the administrative action as documented prior to the start of this litigation since de novo review is not proper in a NEPA case. Therefore, this is the type of case in which the summary judgment procedure has a special utility. Upper West Fork River Water Shed v. Army Corps of Engineers, 414 F.Supp. 908, (N.D. W. Va. 1976), aff'd 556 F. 2d 576, (4th Cir. 1977), cert. denied 434 U.S. 1010. Keeping in mind that any doubt must be resolved

against the moving party, plaintiffs' materials and general assertions when applied with the gravamen of the complaint, do not show sufficient facts to establish that there are genuine issues for trial. Consequently, a trial in this case would be a useless formality since there has been no showing that any different or additional evidence would be adduced. See Lundeen v. Cordner, 354 F. 2d 401 (8th Cir. 1966). Sims v. Mack Truck Corp., 488 F. Supp. 592 (E.D.Pa. 1980). Therefore, for reasons previously given, defendants' motion for summary judgment will be granted and plaintiffs' motions for partial summary judgment will be denied.

An appropriate order will be entered.

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LAKE ERIE ALLIANCE FOR THE PROTECTION OF THE COASTAL CORRIDOR, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 79-110 Erie
UNITED STATES ARMY CORPS OF ENGINEERS, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION

This is an action brought by numerous individuals and organizations against the United States Army Corps of Engineers, the Secretary of the Army and other federal officials challenging the sufficiency of an Environmental Impact Statement (EIS) issued by the federal defendants in connection with the proposed construction of a complex steel-producing facility by United States Steel (USS) at or near Conneaut, Ohio. Jurisdiction is properly invoked under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4332.

The parties have filed cross motions for partial summary judgment with respect to Count Two of plaintiff's amended complaint. In this count, plaintiffs contend that the federal defendants failed to comply with the procedural requirements of section 102 of NEPA, 42 U.S.C. §4332(c)(iii) and (E), by rejecting existing "brownfield" steel facilities in Youngstown, Ohio and Pittsburgh, Pennsylvania as viable partial alternatives to the Conneaut project. Plaintiffs allege that this determination was reached without individualized consideration of these alternative sites and without a balancing of the economic and environmental factors. In short, plaintiffs assert that the EIS does not properly analyze the alternatives that it has identified. The federal defendants responded to plaintiffs' motion with one of their own, contending that they have fulfilled their statutory duty under NEPA, have not acted in an arbitrary, capricious or [illegible]

unlawful fashion in their consideration of alternative sites and therefore ask the court to enter partial summary judgment in their favor.

We begin with the general rule that summary judgment can be granted only where there are no issues as to any material facts. Fed. R. Civ. P. 56(c); Ely v. Hall's Motor Transit Co., 590 F.2d 62 (3d Cir. 1978). Further, all inferences and doubts must be resolved against the moving party. After careful consideration of the issues, the court has determined that both motions must be denied.

The first matter to be disposed of is the scope of this court's review. Plaintiffs argue that judicial review of agency compliance with procedural requirements under a "strict scrutiny" test is appropriate in this case. Plaintiffs cite Philadelphia Council of Neighborhood Organizations v. Coleman, 437 F. Supp. 1341 (E.D. Pa. 1977), aff'd 578 F.2d 1375 (3d Cir. 1978), in support of this proposition. While well reasoned district court opinions may give enlightenment to this court, a case affirmed in the Court of Appeals for the Third Circuit by judgment order has no precedential or institutional value. See Internal Operating Procedures, United States Court of Appeals for the Third Circuit, VI-A, 1.a (1978).

We do not agree that the Third Circuit has mandated a strict scrutiny review of agency compliance with procedural requirements of NEPA. The duty under NEPA to consider alternatives is subject to the rule of reasonableness. County of Suffolk v. Secretary of the Interior, 562 F.2d 1368, 1375 (2d Cir. 1977). Dicta in the Coleman decision reveals that agency compliance with procedural requisites under section 102 is subject to the rule of reasonableness. Despite their protestations, plaintiffs apparently concur. In their memorandum in opposition to federal defendants' motion for partial summary judgment plaintiffs state:

> [i]n summary, the EIS must contain a good faith rigorous objective and detailed presentation of all readily identifiable environmental effects of reasonable alternatives to the proposed project in sufficient detail to allow reasoned decisions by decisionmakers and rational review by the public. Brief for Plaintiffs at 4.

Therefore, plaintiffs are admonished that our scope of review is limited to a study of whether the EIS was compiled in objective good

faith and whether it permits a decision-maker to fully consider and balance the environmental factors.

Turning to the merits of this narrow issue, we note that both parties attempt to abrogate any factual disputes by submitting varying forms of self-serving documents. Rather than offering the usual affidavits pursuant to Fed. R. Civ. P. 56(e), plaintiffs rely on a letter from two Sierra Club lawyers to the District Engineer of the Corps of Engineers complaining of the insufficiency of the EIS, excerpts from the testimony of USS President, William R. Roesch, taken in an unrelated proceeding in the Northern District of Ohio and various other "exhibits" which do not meet the form specified under Rule 56 and whose authenticity and relevancy has been challenged by the federal defendants. Defendants, on the other hand, have complied with the procedural requisites of Rule 56(e) but not the substantive standards thereunder. Defendants have supplied the court with the affidavits of Messrs. Keppel and Leuchner to support their general contentions that they did not act arbitrarily, capriciously or otherwise in abuse of their discretion in eliminating Pittsburgh and Youngstown as alternatives. These affidavits, in turn, are supported by those of Messrs. Roderick and Kirwan, officers of USS, whom can scarcely be considered to be objective in this matter. It would be improper to rely on these four affidavits in granting a motion for partial summary judgment. The affidavits of Messrs. Keppel and Leuchner express conclusions of law and opinons on ultimate facts while those of Messrs. Roderick and Kirwan do not posess the requisite objectivity required for an EIS evaluation. See 42 U.S.C. §4332(D) and 40 C.F.R. §1500.7(c). In addition, we are aware of the Supreme Court's warning that trial by affidavit is not a substitute for a full trial. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962).

The record before us at this time is sufficiently contradictory and unsupported by admissible evidence to enable us to determine conclusively whether or not the federal defendants have performed their duty under NEPA to rigorously explore and objectively evaluate all environmental impacts of all reasonable alternatives. Serious [illegible] disputed issues of [illegible]

admit that they have not done so, contending that "there is no such thing as a 'partial alternative' in this case, nor was the Corps ever required to consider 'partial alternative sites.' Indeed, the Corps was only required to examine alternative sites for a large, integrated steel-making process." Defendants Memorandum at 14. Whether partial alternatives are appropriate or reasonable in this case involves disputed questions of law and fact, precluding the entry of summary judgment for either side. See, NRDC v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972); NRDC v. Callaway, 524 F.2d 69, 93 (2d Cir. 1975).

We agree that there must come a time when the administrative process regarding the evaluation of alternatives must cease. However, it is the purpose of this litigation and the province of this court to determine whether that time has indeed come. Defendants contend that they should not be subject to attack for failing to ferret out every alternative device and thought conceivable by inventive minds, citing in support of this position Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978). Defendants' own admissions indicate that this is not a situation where we will be faced with endless possible alternatives. In their Supplemental Memorandum, defendants state that "plaintiffs point to only two alternative sites where the federal defendants allegedly erred -- Pittsburgh and Youngstown." Defendants' Memorandum at 2. This is brought to our attention to show that the proposed alternative sites are directly related to the location of the headquarters of the local unions involved in this litigation. However, we have already established that a party is not precluded from asserting cognizable injuries under NEPA because his "real" or "obvious" interest may be monetary. Lake Erie Alliance for the Protection of the Coastal Corridor, et al. v. United States Army Corps of Engineers, et al., Civ. No. 79-110 (W.D. Pa. March 18, 1980).

Therefore, we find that although the agency need not ferret out every possible alternative to the proposed action, it must consider those which are forcefully presented and are grounded by some notion of feasibility. Vermont Yankee Nuclear Power Corp. v. NRDC, supra. While we are satisfied with the forcefulness of plaintiffs' presentation, we are less confident of either the feasibility of the [illegible] alternatives or defendants' objective analysis of them.

Therefore, partial summary judgment at this time is inappropriate. An order of court will be entered to this effect.

William T. Hodges
U.S. District Judge

-3 SEP 1980

CC: Counsel of record

No. 83-136

In the Supreme Court of the United States

OCTOBER TERM, 1983

LAKE ERIE ALLIANCE FOR THE PROTECTION OF THE COASTAL CORRIDOR, INC., ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the district court's determination, on a motion for summary judgment, that the Corps of Engineers had fully complied with the National Environmental Policy Act and all other applicable laws in issuing a permit to United States Steel Corp. to construct channels, piers, and water intake and discharge structures in Lake Erie.

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In the Supreme Court of the United States

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania (Pet. App. A-141 to A-177) is reported at 526 F. Supp. 1063. The judgment orders of the court of appeals (Pet. App. A-123, A-126 and A-127) are not reported.

JURISDICTION

The judgment order of the court of appeals was entered on February 16, 1983 (Pet. App. A-127). A petition for rehearing was denied on March 11, 1983 (Pet. App. A-129). The petition for a writ of certiorari was filed on June 9, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND INTERNATIONAL AGREEMENT INVOLVED

The statutes and international agreement relied upon by the petitioners are:

1. The National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, portions of which are set forth at Pet. App. A-74 to A-82;

2. The Federal Water Pollution Control Act, 33 U.S.C. (& Supp. V) 1251, portions of which are set forth at Pet. App. A-84 to A-87;

3. The Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq.*, portions of which are set forth at Pet. App. A-88 to A-91; and

4. The Agreement on the Great Lakes Water Quality, Nov. 22, 1978, United States-Canada, 30 U.S.T. 1383, T.I.A.S. No. 9257, set forth at Pet. App. A-93 to A-120.

STATEMENT

On March 2, 1977, United States Steel submitted an application to the United States Army Corps of Engineers for a permit to construct certain channels and piers in Lake Erie to be used in connection with a new steel plant to be constructed on the shore of the lake between Conneaut, Ohio, and West Springfield, Pennsylvania. United States Steel also applied for permission to build structures that would be used to withdraw and discharge water from the lake during the operation of the plant.

The Corps of Engineers immediately commenced the preparation of a statement on the environmental impact of the proposed action, as required by Section 102 of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. 4332. The Corps established a Technical Team, composed of representatives of the Corps, the United States Environmental Protection Agency, the United States Fish and Wildlife Service, the Federal Regional Counsel, the National Marine Fisheries Service, the State of Ohio and the Commonwealth of Pennsylvania. Two years later, on April 26, 1979, the Technical Team completed and filed

with the Environmental Protection Agency a Final Environmental Impact Statement ("FEIS"). The activities taken by the team in the course of preparing the FEIS are summarized in Appendix A to this Brief.[1] The FEIS itself is 3,470 pages in length. On June 18, 1979, the Corps issued the requested permit to United States Steel.

On July 19, 1979, the petitioners, who aver that they are local residents, environmental groups, concerned citizens, and members of labor unions threatened with unemployment as a consequence of the relocation of steel plants, filed a complaint seeking declaratory and injunctive relief against the Corps of Engineers because of its alleged failure to comply with NEPA, the Federal Water Pollution Control Act, 33 U.S.C. (& Supp. V) 1251 *et seq.*, the Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq.*, the Migratory Bird Act, 16 U.S.C. 701 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*[2] Petitioners sought to rescind the Corps of Engineers' permit pending the preparation of a new environmental impact statement. They also sought revocation of a certification obtained from the State of Ohio under Section 401(a)(1) of the Clean Water Act, 33 U.S.C. (Supp. V) 1341(a)(1), that is a prerequisite to the federal permit.

On September 10, 1980, United States Steel intervened as a defendant. On April 8, 1981, the defendants filed a motion for summary judgment on the ground that, as a matter of law, the environmental impact statement prepared by the Corps of Engineers, and the permit subsequently issued, were in full compliance with all applicable statutes, and that the federal actions taken in this matter had not been arbitrary, capricious, or an abuse of discretion. The petitioners

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[1]This summary was a part of the appendix filed by the petitioners in the court of appeals. See C.A. App. 2199-2229.

[2]An amended complaint was subsequently filed by petitioners, but it did not differ materially from the original complaint.

filed a motion of their own requesting partial summary judgment, although they argued that the entire case could not be disposed of by summary judgment because the FEIS dealt with many disputed matters. After reviewing the petitioners' many contentions, the district court granted the government's motion for summary judgment, denied the petitioners' motion for summary judgment, and dismissed the case (Pet. App. A-141 to A-177). The court noted that "[w]hile we have been impressed with the conscientious efforts of [petitioners] to ferret out every possible procedural deficiency during this two-year process, we have been even more impressed with the good faith efforts of the Army Corps of Engineers" (Pet. App. A-176).

The court of appeals, after hearing oral argument, summarily affirmed (Pet. App. A-127).[3]

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[3]During oral argument, held on January 24, 1983, the court raised the question whether the case was moot because United States Steel had not commenced the construction authorized by the permit, and the permit expired December 31, 1983. The court requested that United States Steel (which was not represented by counsel at the argument) indicate whether it deemed the case to be moot. On January 25, 1983, the court issued a judgment order, affirming the district court's decision (Pet. App. A-123). On January 27, 1983, the Chief Deputy Clerk of the court addressed a letter to United States Steel asking "whether the case is moot in the corporation's view." App. B, *infra*, 22a. On January 31, 1983, the court suspended the judgment order issued on January 25, 1983, and indicated that the "Court continued its desire to receive a response from United States Steel" (Pet. App. A-126). On February 9, 1983, United States Steel responded, pointing out that the permit provided for its automatic expiration upon certain conditions, or for its revocation, and that since the permit had not expired or been revoked "[i]n the view of USS the Permit is still a valid Permit, and USS wishes to retain all of its rights under the Permit." App. C, *infra*, 26a. On February 16, 1983, the court of appeals issued another judgment order, again affirming the judgment of the district court (Pet. App. A-127). United States Steel has since informed the government that it has no current intention of commencing construction under the permit. App. D, *infra*, 28a.

ARGUMENT

Review by this Court is unwarranted for the sufficient reason that this case is, for all practical purposes, moot. The permit challenged by petitioners expires on December 31, 1983 (Pet. 4, n.1), and United States Steel has informed the government that it will not commence construction under the permit prior to its expiration. App. D, *infra*, 28a. In these circumstances, further judicial consideration of petitioners' claims would be imprudent.

In any event, petitioners once more advance arguments that have been carefully considered and properly rejected by two lower courts. Petitioners' fundamental error lies in their assertion that NEPA imposes the substantive duty upon federal agencies considering a proposed action to select "the least environmentally adverse alternative" (Pet. 30). This reading of NEPA, however, is in reality a blueprint for complete stasis, and is plainly not the law. Virtually every environmental impact statement ever prepared considers, as one alternative to the proposed action, the possibility of doing nothing; but "doing nothing"—although frequently the "least environmentally adverse alternative" to the proposed federal action—is clearly not required by NEPA. Indeed, in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978), this Court held that NEPA's mandate to the agencies is "essentially procedural," and in *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980), the Court emphasized that NEPA does not require an agency, in selecting a course of action, to elevate environmental concerns over other appropriate considerations. These holdings, dismissed by the petitioners as obiter dictum (Pet. 26), were expressly followed by the courts below, and compel the conclusion that petitioners' numerous contentions are completely without merit.

1. Petitioners contend (Pet. 10-19) that they were "unlawfully denied an opportunity to challenge the adequacy of the [F]EIS prepared by the Corps" because they were not allowed to present evidence to supplement or contradict the FEIS. The decisions of the district court and the court of appeals, however, merely apply the settled rule that when administrative proceedings—including proceedings involving the preparation and adequacy of NEPA statements—are the subject of judicial review, the adequacy of the agency action must be determined on the basis of the administrative record already in existence, and not some new record made initially in the reviewing court. *Camp* v. *Pitts*, 411 U.S. 138 (1973); *Upper West Fork River Watershed Ass'n* v. *Corps of Engineers*, 414 F. Supp. 908 (N.D.W.Va. 1976), aff'd, 556 F.2d 576 (4th Cir. 1977), cert. denied, 434 U.S. 1010 (1978).

Petitioners suggest that the Second Circuit has held otherwise (*County of Suffolk* v. *Secretary of the Interior*, 562 F.2d 1368 (1977), cert. denied, 434 U.S. 1064 (1978)), and assert that there is a conflict among the circuits that warrants this Court's attention (Pet. 14). But, contrary to petitioners' submission, the Second Circuit's *County of Suffolk* decision did not hold that the introduction of evidence in the district court is proper or desirable whenever the adequacy of an FEIS is challenged. Rather, the court held only that a district court's ruling allowing the submission of evidence was not necessarily improper. The court, moreover, emphasized (562 F.2d at 1385) that "evidence introduced for the first time in the district court * * * would be probative only insofar as it tended to show either that the agency's research or analysis was clearly inadequate or that the agency improperly failed to set forth opposing views widely shared in the relevant scientific community." In this case, the FEIS sets forth the relevant research and opposing views fully and candidly; petitioners' grievance is simply

that the agency did not accept the opposing views.[4] Consequently, there is no need here for the introduction of additional testimony like that which was permitted in *County of Suffolk*, and that decision is entirely compatible with the holding in the instant case.

2. Petitioners contend that since there are "genuine issues of material fact in dispute regarding the adequacy of the [F]EIS and regarding whether the Corps acted in good faith in preparing it" (Pet. 19), the district court's entry of summary judgment was in error. However, petitioners' assertion that "genuine issues of material fact" remain in this litigation is plainly incorrect. To be sure, whether or not the FEIS is adequate *is* in dispute, but the text of the FEIS itself *is not* in dispute. And, it is eminently within the purview of the district court to determine, upon a motion for summary judgment, whether the text of the FEIS is "adequate."

The FEIS in the instant case exhaustively considers all of the alleged possibilities of environmental and economic harm cited by petitioners. See Pet. 19-26. The environmental and sociological pros and cons of the proposed activity are discussed at length. The mere fact that the ultimate conclusion reached by an FEIS may be earnestly debated, as petitioners do here, in no way precludes the entry of

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[4]The Pennsylvania Game and Fish Commission, for instance, opposed issuance of the permit, and petitioners argued in the district court that the final decision to issue the permit was wrong because the Pennsylvania agency recommended against it (Pet. App. A-174). To this objection, the district court responded (Pet. App. A-175):

> The fact that the Pennsylvania Game and Fish Commission opposed issuance of the permit does not mean that the Corps did not give "full consideration" or "great weight" to the views of that agency. It only shows that they gave greater weight to the views of the majority of the agencies and experts which studied the effects the plant would have on wildlife.

summary judgment in a NEPA case. So long as it is clear, as it is here, that the federal agency that made the ultimate conclusion set forth in an FEIS was aware of all relevant conflicting viewpoints, and made its decision with full knowledge of those disputes, the underlying goal of NEPA has been achieved. See *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen, supra*, 444 U.S. at 227 (NEPA requires "hard look" at environmental consequences of federal action but does not impose substantive limitations on that action).

3. Petitioners also challenge (Pet. 23-26) the good faith of the Corps in issuing the FEIS in this case. The "two factual bases" (Pet. 23) for petitioners' assertion of bad faith, however, even if true (which we here assume arguendo solely for the purpose of showing their legal irrelevancy) do not in any way support a legal conclusion of bad faith.

The first supposed "factual basis" for the Corps' bad faith rests upon petitioners' allegation that United States Steel intends eventually to build a larger plant than the one for which the FEIS was prepared. But an impact statement must address only the action actually proposed--not one that may be merely contemplated. *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 (1976); *Weinberger* v. *Catholic Action of Hawaii*, 454 U.S. 139, 146 (1981). If the steel plant is ever expanded, such federal actions as may be required in connection with that expansion will at that time be subject to NEPA. See *Kleppe* v. *Sierra Club, supra*, 427 U.S. at 410 n.20 ("Should contemplated actions later reach the stage of actual proposals, impact statements on them will take into account the effect of their approval upon the existing environment; and the condition of that environment presumably will reflect earlier proposed actions and their effect").

The other purported evidence of the Corps' bad faith is that the "vast majority" of the information in the FEIS was supplied by United States Steel (Pet. 25). This revelation,

however, is hardly surprising. The plant, if it is ever built, will be built to specifications established by United States Steel, and it is from United States Steel, accordingly, that information with respect to its plans must come. An FEIS, after all, is a source document for the making of an informed decision; in a situation such as the one presented here, there can be no better source of information regarding the size, scope, and operations of a steel plant than the steel company itself. See *Sierra Club* v. *Lynn*, 502 F.2d 43, 59, reh'g denied, 504 F.2d 760 (5th Cir. 1974), cert. denied, 421 U.S. 994 (1975).

Of course the evaluation of appellant's information, and the agency decision whether to issue the requested permit, is another matter. But nothing in the record would support a contention that the Corps failed conscientiously and in good faith to make an informed and reasoned decision after consideration of all points of view as reflected in the exhaustive record. *Life of the Land* v. *Brinegar*, 485 F.2d 460, 467 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974). The record clearly reveals that while certain technical data (such as the location and size of the plant, the manufacturing processes to be used and the immediate physical consequences of those processes) came principally from United States Steel, the Technical Team established to produce the FEIS actively and critically reviewed that material, and in numerous instances required additional information and further independent studies.

4. Petitioners contend (Pet. 39) that the Corps failed to consider "cost data." Exactly what those "cost data" are, however, the petitioners do not say. The argument made by the petitioners below, and apparently now abandoned in favor of something more nebulous and therefore less easily refuted, is that the Corps failed to specifically balance the costs and benefits of the proposed project. But, notwithstanding petitioners' protestations, a formal cost-benefit

analysis is not required by NEPA. Where the advantages and disadvantages of a project are fully discussed in the FEIS, the failure to affix numerical weights to each of these does not make the FEIS inadequate. *Cady* v. *Morton*, 527 F.2d 786, 797 (9th Cir. 1975).[5]

5. Petitioners assert (Pet. 39-40) that partial alternatives to the proposed plant were not considered. Again, the petitioners do not define "partial alternatives," but whatever such alternatives might include, it is difficult to imagine that they would differ in essence from, or not be included within, the many alternatives that were considered during the preparation of the FEIS. As the district court found (Pet. App. A-154):

> The [F]EIS devotes 130 pages to the consideration of alternatives to the proposed project. These alternatives include no action, rearrangement of plant layout, alternative process units, alternative plant operation concepts, alternative sites, alternative processes, alternative ancillary facilities, alternative solid waste management systems, alternative operation and maintenance methodologies, alternative intake and discharge systems, alternatives to the original proposal to fill and divert Turkey Creek, and alternative pier extension and dock design[s]. Alternative "Brownfield" sites in Chicago, Illinois, Gary, Indiana, Youngstown and Lorain, Ohio were considered. Greenfield sites along the Great Lakes Shoreline in Indiana, Illinois, New York, Ohio and Pennsylvania were studied. All were

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[5]In any event, cost-benefit analyses, helpful as they are when the costs are paid by and the benefits inure to governmental entities and their constituents, are of less significance when the costs are paid by private parties (here United States Steel) while the benefits are evaluated not from the point of view of the private entrepreneur, but from the point of view of the community in general.

rejected because the Corps determined that, although feasible for some degree of industrial expansion, they offered no advantage over the Conneaut site due to social, economic and environmental problems.

6. Petitioners contend (Pet. 42) that the Corps failed to give sufficient consideration in the FEIS to the Agreement on the Great Lakes Water Quality, Nov. 22, 1978, United States-Canada, 30 U.S.T. 1383, T.I.A.S. No. 9257. As the district court noted, however, the FEIS referred to the terms of the agreement, discussed how compliance with the agreement would be enforced, and, after comparing the predicted discharge of the planned steel mill with the standards set forth in the agreement, concluded that the proposed activity was consistent with the agreement (Pet. App. A-167 to A-168). NEPA requires nothing more.[6]

7. Petitioners contend (Pet. 43) that the FEIS did not address the environmental impacts of expanding a raw materials handling facility owned by the Pittsburgh and Conneaut Dock Company, a subsidiary of United States Steel, in Conneaut Harbor. The district court found otherwise (Pet. App. A-165), and cited the specific pages on which these impacts were discussed. It is clear that in this respect, as in the others above, the FEIS fulfilled its statutory function of bringing to the attention of the decisionmakers the possible environmental consequences of their proposed action.

8. Petitioners' allegation (Pet. 44-45) that the Corps did not consider the effects of potential air and water pollutants on local vineyards, plant nurseries, and aquatic species in Lake Erie is palpably incorrect. Pages 5917-5919 and

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[6]Major responsibility for the implementation of the agreement, moreover, has been assigned to an international joint commission. The comments of that commission were solicited, but none were received.

5927-5931 of the record filed in the court of appeals[7] contain in narrative form a summary of and index to those portions of the FEIS where these matters were considered.

9. Petitioners contend (Pet. 46-53) that United States Steel failed to obtain a valid certification from either Ohio or Pennsylvania, as required by Section 401 of the Federal Water Pollution Control Act, 33 U.S.C. (& Supp. V) 1341. But, as the district court held (Pet. App. A-160), United States Steel has acquired the necessary certification from the State of Ohio, where the discharge pipe is located, and does not need a separate certification from the State of Pennsylvania.[8]

10. Finally, petitioners contend (Pet. 53-57) that the Corps violated the letter and spirit of the Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq.*, by giving little weight to the views of the federal and state wildlife agencies. The Corps, however, clearly effected the coordination required by the Coordination Act. See C.A. App. 3756-3838, 3839-4047. Indeed, the Corps issued the permit on the condition that (C.A. App. 5858):

> [t]he permittee will implement the fish and wildlife management plan for the Lake front site as defined in the final EIS and the December 1978 report prepared by Fahringer, McCarty, Grey, Inc. [A. V, 2146-2196].

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[7]The record submitted to the court of appeals by the petitioners comprised 6,071 pages.

[8]That the State of Ohio has issued the necessary certification has been conclusively determined by litigation in state court (*Lake Erie Alliance* v. *McAvoy*, No. EBR 79-63 (Jan. 4, 1980), aff'd, No. 80AP 105 (Franklin Co. Ct. App., Ohio, Aug. 28, 1980), cert. denied, (Dec. 18, 1980)), and that Pennsylvania is not required under the Federal Water Pollution Control Act to provide certification under Section 401 has been determined by the General Counsel of the Environmental Protection Agency (Op. Gen. Counsel No. 78-8, at 407 (Apr. 19, 1978).

> The permittee will coordinate with the Pennsylvania Fish and Game Commissions and the Ohio Department of Natural Resources during the implementation of this plan.[9]

In the final analysis, this case reflects petitioners' profound distress over the fact that the Corps has authorized the construction of a plant that they, for a variety of reasons, oppose. Because many of the petitioners' reasons for contesting the construction of the plant are not environmental (some of the petitioners, for example, are steelworkers in Pittsburgh who fear that they might lose their jobs if the new plant is built), no degree of attention given to the purely environmental aspects of the construction and operation of the plant will ever completely satisfy their objections. The very fact that the environmental impact statement prepared in this case is so comprehensive, involves so many facts and opinions, and is so long (3,470 pages) ensures that those who oppose the ultimate agency action can—with relative ease—find points to dispute, issues to rake over, and uncertainties to dwell upon. The issues thus raised, however, are not factual, but rather go to the conclusions to be drawn from the text of the FEIS. This "controversy of experts," so common in NEPA cases, is one that courts properly decline to enter. *Manygoats* v. *Kleppe*, 558 F.2d 556, 560 (10th Cir. 1977).

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[9]In any event, there can be no question that the Corps complied with NEPA, and as was stated in *Cape Henry Bird Club* v. *Laird*, 359 F. Supp. 404, 418 (W.D. Va.), aff'd, 484 F.2d 453 (4th Cir. 1973), compliance with NEPA is de facto compliance with the coordination requirements of the Fish and Wildlife Coordination Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1983

DOJ-1983-09

APPENDIX A

DEVELOPMENT OF THE ADMINISTRATIVE RECORD

The first duties of the Technical Team included review and evaluation of the Corps' "Guide to the Preparation of the Environmental Impact Assessment for New Source Fossil Fuel Power Plants Requirng a Department of the Army Permit," the environmental assessment outline prepared by A.D. Little, and the scope of on-site data collection required in order to assure that the initial environmental assessment developed for the site would be adequate for a FEIS.[1] Public notice for the proposed work was issued March 11, 1977.[2] The Corps also issued a press release describing the project.[3]

On March 15, 1977, the Technical Team met at the offices of U.S. Steel in Pittsburgh, to discuss agency concerns with U.S. Steel and A.D. Little.[4] The U.S. Fish and Wildlife Service agreed to initiate a fish sampling program for the creeks and streams in the project area and in the shallow waters of Lake Erie adjacent to the plant site. The State of Ohio provided technical input on issues related to air quality and project plan mitigation. The Commonwealth of Pennsylvania provided baseline data and written comments outlining concerns in the realm of secondary impacts. The Corps provided the data and format requirements for the environmental impact assessment as a whole. The Technical Team requested a definitive project description from U.S. Steel so that agency input could be refined and sound mitigation measures developed.

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[1]AR, Vol. 1.

[2]A 1-11.

[3]AR, Vol. 1.

[4]AR, Vol. 2.

Shortly thereafter, the Technical Team notified U.S. Steel that the assessment format did not conform to Corps requirements, that on-site archaeological and cultural resources had to be initiated with dispatch, that extensive species lists should be limited to those actually generated during data collection, that aquatic field studies should address agency criteria for intake and discharge structure siting, and that a section on secondary "spin-off" impacts should be included.[5]

The Technical Team met at the offices of A.D. Little in Cambridge, Massachusetts, on March 29, 1977, to provide U.S. Steel and A.D. Little with further guidance for preparation of the environmental assessment and to resolve other matters relating to the proposed project.[6] Representatives of A.D. Little provided a revised outline for the environmental assessment which was generally acceptable.

On April 1, 1977, leaders of various governmental regulatory agencies, including representatives from the Corps, EPA, U.S. Fish and Wildlife Service, State of Ohio, Commonwealth of Pennsylvania, and U.S. Steel met in Conneaut, Ohio, for a briefing on the status of environmental impact studies for the proposed project.[7] A tour of the proposed plant site followed the meeting.

The Technical Team met on April 5, 1977, at EPA offices in Chicago, Illinois, to discuss air quality issues related to the proposed mill.[8] The participants agreed that a description of the plant process equipment was necessary in order to fully model atmospheric emissions from the proposed

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[5]AR, Vol. 2.

[6]AR, Vol. 2.

[7]AR, Vol. 2.

[8]AR, Vol. 5.

facility. The use of three months of on-site data combined with existing information was deemed sufficient for the FEIS. U.S. Steel was directed to continue the data collection process to test the validity of certain predictions and conclusions. The participants agreed to address the effect of plant emissions on the grape industry in Western New York, Pennsylvania, and Ohio as a specific issue. EPA staff agreed to provide A.D. Little specialists with information on the effect of atmospheric emissions on agricultural crops and natural vegetation. In addition, A.D. Little agreed to prepare a revised air quality program for benz-a-pyrene and fluorides.

The following day the Team met to discuss the proposed work plan for performance of aquatic and terrestrial sampling at the proposed site.[9] U.S. Steel was also advised to develop mitigatory and alternative plans vis-a-vis the filling of Turkey Creek, using assistance from the Technical Team. The Team also discussed other topics, such as establishment of a mixing zone (800-foot diameter), spawning habitat and aquatic sampling periods, and placement of the intake structure.

A notice was issued on April 15, 1977, that a public hearing would be held in Conneaut, Ohio, on May 16, 1977, to discuss the Conneaut project in detail.[10]

The Technical Team met in Conneaut, Ohio, on April 14 and 15, 1977, to again inspect the proposed plant site. The purpose of the meeting was to identify environmentally-sensitive areas within the site boundary, recommend alternative or mitigative courses of action that could be employed to significantly lessen environmental impact, review field sampling proposals, and delineate those areas subject to regulation under Section 404 of the Clean Water Act. The

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[9]AR, Vol. 5

[10]AR, Vol. 2.

concerns and recommendations of the various agency representatives were summarized and sent to U.S. Steel.[11] The company response followed.[12]

A.D. Little sponsored a workshop on April 19, 1977 to acquaint community officials, as well as local and regional planning personnel, with procedures for analysis of environmental impacts. The Corps staff participated in the session. Topics of discussion included air quality, aquatic ecology, geology, hydrology, and socioeconomics.[13]

Thereafter, the Corps requested U.S. Steel to evaluate several issues raised during the public interest review, including the effect of plant emissions on agricultural crops and native vegetation, plant-induced secondary growth and development, placement of fill in Turkey Creek, discharge of plant effluents into the littoral zone of Lake Erie, loss of ichthyoplankton associated with the operation of the plant intake, and the need for an erosion control plan during construction and subsequent operation of the proposed mill.[14]

Throughout the administrative process all written comments received on the project were regularly sent to U.S. Steel for review, evaluation, and comment, as required by 33 CFR § 325.2(a)(3).

The Technical Team met on April 25, 1977, in Philadelphia, Pennsylvania, to discuss the modeling procedures for secondary impact evaluation and to provide an opportunity for agency officials to identify the socioeconomic impact issues involved in the project.[15] Topics of discussion

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[11]AR, Vol. 3.

[12]AR, Vol. 10.

[13]AR, Vol. 3.

[14]AR, Vol. 3.

[15]AR, Vol. 5.

included potential increases in carbon monoxide levels at highway intersections near the proposed plant, information gaps in the baseline data that could affect the output of the SIMPACT IV model, and the need to identify highway interchanges that would improve traffic flow in the vicinity of the Lakefront plant.

The Corps then prepared a public affairs plan and fact sheet for distribution throughout the regional impact area.[16] Several public workshops were also conducted.[17] A toll-free telephone line was established on May 24, 1977, so that area residents could speak to the Corps staff directly on matters pertaining to the proposed mill.

On May 2, 1977, U.S. Steel furnished revised terrestrial and aquatic sampling proposals to the Technical Team.[18] On this same date, the Technical Team met to discuss issues pertaining to the geologic and hydrologic characteristics of the proposed steel plant site.[19] The team met again May 11 and 12, 1977, to discuss air and water quality issue.[20]

A public hearing was held in Conneaut, Ohio, on May 16, 1977. Issues raised during the hearing included the effect of plant emissions on agricultural and native vegetation, secondary growth and development, placement of fill in Turkey Creek, loss of aquatic and terrestrial habitat, discharge of waste effluents into the Lake Erie littoral zone, potential loss of ichthyoplankton during the operation of the water intake and entrainment of adult fish species on the intake heads, and need for development of a suitable on-site

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[16]AR, Vol. 6.

PVAR, Vols. 5, 6, 11, 12.

PWAR, Vol. 6.

PXAR, Vol. 8.

QYAR, Vol. 10.

erosion control plan, energy, and unemployment in the Conneaut area. Hearing files were established in Buffalo, Cleveland, and Conneaut, Ohio.

On May 20, 1977, the Corps requested information from EPA regarding Federal and State standards for sulfur dioxide emissions.[21] The EPA responded on June 2, 1977.[22]

On May 25 and 26, 1977, a series of technical conferences were held at EPA offices in Philadelphia to discuss use of the SIMPACT model, secondary socioeconomic effects, air, noise, and water quality impacts, and transportation needs.[23]

On May 27, 1977, the Corps announced that additional public hearings would be held in Erie, Pennsylvania, on June 29, 1977, and Ashtabula, Ohio, on June 30, 1977.[24] An additional hearing file was established in Erie, Pennsylvania.

On June 9, 1977, the Technical Team met in Pittsburgh to resolve administrative and technical problems relating to review of the permit application. Topics of discussion included actions which could delay or prohibit issuance of the permit, storm and surface water runoff, solid waste, shoreline discharge of waste effluents, Technical Team coordination, agency data requirements, and alternatives to the diversion and filling of Turkey Creek. The A.D. Little staff also provided a status report on data collection and preparation of their environmental report.[25] The Technical Team met again on June 25, 1977 to evaluate the data

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[21]AR, Vol. 10.

[22]AR, Vol. 10.

[23]AR, Vol. 10.

[24]AR, Vol. 10.

[25]AR, Vol. 12.

contained in the effluent and emission inventories prepared by U.S. Steel.[26].

On June 23, 1977, the Corps forwarded a letter to U.S. Steel requesting prompt answers to questions raised by the Concerned Citizens organization at a workshop held in Conneaut, Ohio, on June 21, 1977.[27] Issues raised in this correspondence included the need for a 72-inch diameter intake pipeline, the rationale for facility need, the potential for shutdown of existing plants if the Lakefront mill proceeded into operation, contingency plans for oil spills or the failure of pollution control equipment, and the effect of plant emissions on agricultural crops, nursery stock, and native vegetation. Detailed responses to each inquiry were provided by U.S. Steel on July 15, 1977.[28]

On June 24, 1977, the Technical Team convened to evaluate the field data collection effort by Aquatic Ecology Associates, Inc. and to identify ways in which the existing sampling program could be improved.[29] During this meeting, guidance was provided concerning the establishment of a baseline for stormwater runoff and the measurement of priority pollutant levels in fish tissue.

On June 27, 1977, U.S. Steel transmitted completed copies of an EPA questionnaire dealing with water related issues to each member of the interagency Technical Team.[30] EPA had initially requested completion of the questionnaire at the June 15, 1977 Technical Team meeting.

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[26]AR, Vol. 12.

[27]AR, Vol. 12.

[28]AR, Vol. 12.

[29]AR, Vol. 12.

[30]AR, Vol. 12.

The Corps later sent letters to U.S. Federal Regional Council in Chicago, Illinois, and Philadelphia, Pennsylvania, requesting a list of applicable permits that must be secured prior to construction and operation of the proposed steel mill. Similar correspondence was forwarded to the Ohio EPA and the Commonwealth of Pennsylvania.[31]

The Technical Team met on June 29, 1977, to examine solid waste disposal problems relating to the proposed steel facility.[32] Discussion centered on landfill availability in the vicinity of the proposed plant, recycling of solid wastes, soil characteristics and groundwater resources of the Lakefront site, and methods of solid waste disposal.

Additional public hearings were held in Erie, Pennsylvania, and Ashtabula, Ohio. Topics of concern included the effect of plant related emissions' on agricultural and native vegetations, secondary growth and development impacts, Turkey Creek and potential loss of aquatic and terrestrial habitat, erosion control, formation of a greenbelt surrounding the plant, labor supply and unemployment, credibility of information supplied by U.S. Steel, adverse social impact, and possible Federal funding for municipal water supplies.

Corps representatives later met with U.S. Steel and A.D. Little to review the outline for their environmental report. Format requirements for the assessment were also established during this meeting.[33] Corps representatives also attended a public forum sponsored by the State of Ohio.[34]

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[31]AR, Vol. 12.

[32]AR, Vol. 17.

[33]AR, Vol. 16.

[34]AR, Vol. 16.

During the review process, U.S. Steel regularly distributed progress reports on the Aquatic Ecology Associates, Inc. field sampling effort to members of the interagency Technical Team. The results contained in each interim document were eventually compiled into a single two volume document.[35] Copies of the interim and final reports were also placed in each of the designated hearing files. Responses to the request for applicable permit lists were received from the Commonwealth of Pennsylvania, Ohio EPA, and the FRC.[36]

The Technical Team met on July 29, 1977 to discuss Best Available Control Technology (BACT) and Lowest Achievable Emission Rates (LAER) requirements for the proposed mill.[37]

During the first week of August 1977, representatives of the Corps toured those U.S. Steel plants in Alabama and Texas utilizing processes and pollution control technology similar to those proposed for the Conneaut Plant.

Corps representatives attended a public meeting conducted by EPA in Conneaut, Ohio, on August 3, 1977.[38]

As they were completed, draft portions of the A.D. Little environmental assessment were forwarded to the Corps and the interagency Technical Team for independent review and comment. This procedure began on August 4, 1977, and continued until January 6, 1978, when the final section of the draft was received from U.S. Steel. At the same time, A.D. Little evaluated Technical Team comments and incorporated them into its final environmental assessment,

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[35]AR, Vol. 99.

[36]AR, Vol. 17, 18.

[37]AR, Vol. 18.

[38]AR, Vol. 18.

which U.S. Steel transmitted to the Corps on July 5, 1978. Copies of the draft and final assessments were placed in each of the designated hearing files.

On August 8, 1977 the Corps furnished U.S. Steel with a list of the regulatory permits required for the proposed mill.[39]

The Technical Team also met to discuss Best Available Demonstrated Technology (BADT) guidelines and to review modeling techniques used to predict plant related impacts on air quality.[40]

On August 16, 1977, the District Engineer requested that certain Federal, State, and local agencies review the U.S. Steel proposal to determine the degree of conformance with the objectives and specific terms of existing or proposed land use plans, policies, and controls.[41]

The August 29, 1977, response from Ashtabula County indicated that the proposed development was compatible with land use plans through the year 2000.[42] On August 31, 1977, the Mayor of Conneaut responded by providing copies of the city zoning map and applicable ordinances.[43] The September 8, 1977, response from the Pennsylvania State Office of Planning and Development described several planning strategies that would be used to evaluate the U.S. Steel proposal.[44]

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[39]AR, Vol. 18.

[40]AR, Vols. 18, 20.

[41]AR, Vol. 18.

[42]AR, Vol. 22.

[43]AR, Vol. 22.

[44]AR, Vols. 28, 29, 30.

On August 17, 1977, the Corps met with representativees of Erie County, Pennsylvania, agricultural groups to discuss the U.S. Steel proposal. Major concerns identified during this session included the potential loss of farmland as a result of plant-induced growth and development and the effect of plant emissions on crops and nursery stock. The meeting concluded with a tour of area farming districts.

The Corps sent the Technical Team copies of the transcripts and written comments from the June 29 and 30 hearings.

The Corps retained the services of Dr. Brian J.L. Berry, Director of the Laboratory for Computer Graphics and Spatial Analysis, Graduate School of Design, Harvard University, Cambridge, Massachusetts, to review and evaluate the A.D. Little analysis of plant related socioeconomic impacts.

On August 30, 1977, the Technical Team met in Chicago, Illinois, to continue discussions relating to the plant emissions inventory and BACT/LAER requirements.[45]

The Corps requested that U.S. Steel develop a study to determine the effect of plant related emissions on native vegetation, nursery stock, and agricultural crops. A copy of an August 30, 1977, letter from Donald D. Davis, Associate Professor, Pennsylvania State University, was included with this correspondence.[46].

On September 9 and 10, 1977, representatives of the Corps attended public meetings sponsored by the Sierra Club in Cleveland, Ohio, and Erie, Pennsylvania, that included a presentation by Stewart Udall, former Secretary of the Department of the Interior.[47]

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[45]AR, Vol. 27.

[46]AR, Vol. 27.

[47]AR, Vol. 30.

On September 12, 1977, U.S. Steel advised the Corps that the plant discharge structure would be moved to an offshore location, to minimize impacts on the aquatic biota.[48] At a meeting in Cambridge, Massachusetts, on September 20, 1977, Dr. Brian Berry was briefed on the SIMPACT models used by A.D. Little to identify and define certain environmental impacts associated with the construction and operation of the proposed mill.[49]

The Technical Team met on September 23, 1977, to identify and resolve issues that could delay the completion of the A.D. Little environmental reports.[50] Items of discussion included the lack of agreement on BACT/LAER limitations and the A.D. Little rationale for plant emissions, overdue field reports, and the need for viable alternatives to the placement of fill in Turkey Creek.

The Corps transmitted the cultural resource survey of the Lakefront site to the National Park Service and the State Historic Preservation Officers for review on September 26, 1977.[51] Responses were received on November 25, 1977.[52]

Between September 28, 1977 and January 10, 1978, comments on the SIMPACT model and the A.D. Little socioeconomic impact analysis provided by the Corps' consultant, Dr. Brian J.L. Berry, were transmitted to U.S. Steel for review and evaluation. A final report critiquing the overall socioeconomic impact assessments for the proposed steel plant was furnished by Dr. Berry on March 15, 1978.[53]

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[48]AR, Vol. 30.

[49]AR, Vol. 35.

[50]AR, Vol. 35.

[51]AR, Vol. 35.

[52]AR, Vol. 45.

[53]AR, Vol. 65.

The Technical Team met on October 3 and 12, 1977, to continue discussions relating to plant emissions inventory and BACT/LAER requirements.[54]

On October 3-5, 1977, representatives of the U.S. Fish and Wildlife Service, Pennsylvania Fish and Game Commissions, and the Ohio Department of Natural Resources, conducted a field survey of the Turkey Creek watershed. The purpose of this investigation was to identify alternative, mitigative, or compensatory actions that would lessen the impacts associated with the filling and diversion of Turkey Creek.[55]

Colonel Daniel D. Ludwig addressed the Northwest Pennsylvania Futures Committee on October 5, 1977. Colonel Ludwig discussed Corps involvement in the proposed U.S. Steel project.

In response to a request from the Concerned Citizens of Conneaut, Ohio, the Corps extended the comment period on the DEIS from 45 to 90 days.[56]

On October 25, 1977, copies of the "Final Report on the Discriminant Archaeological Analysis of Erie and Crawford Counties, PA and Ashtabula County, OH" prepared by A.D. Little were distributed to the National Park Service and the State Historic Preservation Officers for review.[57] The National Park Service responses transmitted to the Corps on November 11, 1977, and November 28, 1977, indicated that this document was of significant value as a planning tool for reconnaissance-level investigations.[58]

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[54]AR, Vols. 36, 37.

[55]AR, Vol. 36.

[56]AR, Vol. 38.

[57]AR, Vol. 38.

[58]AR, Vols. 43, 45.

Representatives of the Pennsylvania Fish and Game Commissions, Ohio Department of Natural Resources, U.S. Fish and Wildlife Service, and the Corps met on October 27, 1977, to discuss potential compensation measures for the loss of Turkey Creek.[58]

The Technical Team met on November 1, 1977, to discuss comments on the SIMPACT model provided by Dr. Berry, on November 7, 1977, to discuss the A.D. Little memorandum on worst case scenarios for air quality modeling, and on December 15 and 16, 1977, to review the socioeconomic portion of the A.D. Little draft assessment.[60]

On November 9, 1977, representatives of the Ohio Department of Natural Resources met with U.S. Steel to present the State of Ohio position on the filling and diversion of Turkey Creek.[61] Representatives of U.S. Steel met with the Corps on December 29, 1977, to review coordination procedures to be followed during preparation of the DEIS.[62] U.S. Steel agreed to submit revised drawings, which were received by the Corps on February 6, 1978.[63]

On February 1, 1978, the Corps requested that the Springfield Township Zoning Office review the U.S. Steel proposal to determine the degree of conformance with the objectives and specific terms of existing or proposed land use plans, policies, and controls.[64] The Erie County Metropolitan Planning Commission responded on behalf of

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[58]AR, Vols. 43, 45.

[59]AR, Vol. 41.

[60]AR, Vol. 44, 43, 55.

[61]AR, Vol. 43.

[62]AR, Vol. 58.

[63]AR, Vols. 55, 58.

[64]AR, Vol. 58.

Springfield Township Zoning Office. Their correspondence, dated February 7, 1977, contained zoning and subdivision ordinances of Springfield Township and East Springfield Borough and a status report on regulating plans and controls for Girard Township and the Boroughs of Girard, Lake City, Albion, and Cranesville.[65]

The DEIS was filed with EPA on May 23, 1978. At the same time, copies of this document were forwarded to Federal, State, and local agencies, environmental groups, public libraries, and interested individuals for review.[66] A notice of availability was also widely distributed throughout the regional impact area.[67] Additional copies of the DEIS and the 19-page summary of this document were provided to individuals on request.[68]

The public review period for the DEIS began on June 5, 1978, the date the notice of receipt by the EPA was filed in the Federal Register.[69]

The Corps issued a Public Notice on June 8, 1978, announcing the schedule for hearings on the U.S. Steel proposal.[70] Public hearings were held in Conneaut, Ohio (July 11, 1978), Erie, Pennsylvania (July 25, 1978), Ashtabula, Ohio (August 14, 1978), and West Springfield, Pennsylvania (August 22, 1978). Significant issues raised during these hearings were addressed in the FEIS.

On June 13, 1978, the Corps requested that the U.S. Department of Agriculture Soil Conservation Service determine the existence of prime or unique farmlands on the

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[65]AR, Vol. 59.

[66]AR, Vol. 66.

[67]AR, Vol. 66.

[68]AR, Vol. 66.

[69]AR, Vol. 68.

[70]AR, Vol. 68.

proposed Lakefront Plant site.[71] The Soil Conservation Service response of July 18, 1978 indicated that approximately 70 percent of the Ohio portion of the Lakefront site is classified as prime farmland and that no unique farmlands were present within the project area.[72]

During the DEIS comment period, the Corps staff participated in the following public information workshop: June 14, 1978, workshop sponsored by the Conneaut Chamber of Commerce; June 26, 1978, workshop sponsored by the County of Erie, Pennsylvania; June 27, 1978, workshop sponsored by Ashtabula Chamber of Commerce; and June 28, 1978, workshop sponsored by Albion Chamber of Commerce. Topics of discussion included population, taxes, land use, and air and water quality.

On August 14, 1978, the Corps issued a press release advising the public that the review period for the DEIS would not be extended beyond the September 8, 1978, deadline.[73] The Corps transmitted a letter of explanation to local governmental officials and representatives of area environmental groups on August 17, 1978.[74]

On July 11, 1978, the Corps requested that U.S. Steel forward copies of the A.D. Little report entitled "Report on the Environmental Impacts of the U.S. Steel Corporation's Proposed Lakefront Plant" to each member of the interagency Technical Team and to the public libraries in Erie, Pennsylvania, and Conneaut, Ohio, and the Corps office in Cleveland, Ohio. U.S. Steel complied with this request on July 18, 1978.

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[71]AR, Vol. 68.

[72]AR, Vol. 94.

[73]AR, Vol. 96.

[74]AR, Vol. 96.

Representatives of the Corps participated in panel discussion of the U.S. Steel proposal televised by WICU-TV and WSEE-TV of Erie, Pennsylvania. Some of these broadcasts were "live" and others were taped for later broadcast during the summer and fall of 1978. Corps staff also participated in a panel discussion broadcast by WFUN-AM radio of Ashtabula, Ohio.

On August 8, 1978, representatives of various sport clubs, State and Federal agencies, and U.S. Steel met in Conneaut, Ohio, to discuss treatment of Turkey Creek.[75]

The comment period for the DEIS ended September 8, 1978. On the same day, the Technical Team met to discuss air quality issues relating to the combined effect of emissions from the proposed COHO power plant and the U.S. Steel Lakefront facility.[76]

On November 30, 1978, the EPA indicated that the A.D. Little analysis of combined emission impacts was adequate for the purposes of the FEIS.[77]

The Federal Regional Council sponsored a meeting on September 13, 1978, to discuss comments onthe population projections presented in the DEIS.[78]

The Corps sent copies of the comments received during the DEIS review period to U.S. Steel for comment and response and to Technical Team members, local officials and area libraries.[79] It also issued a notice advising the public that an information meeting on the U.S. Steel proposal would be held in Conneaut, Ohio, on October 18,

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[75]AR, Vol. 96.

[76]AR, Vol. 99.

[77]AR, Vol. 111.

[78]AR, Vol. 110.

[79]AR, Vol. 110.

1978.[80] During this meeting, agency officials presented their comments on the DEIS and answered questions from the general public. Additional comments were sent to U.S. Steel on September 28, 1978, and November 14, 1978.[81]

On October 11, 1978, the Mid-Atlantic Federal Regional Counsel advised the Corps that the proposed U.S. Steel project was consistent with the goals of the President's national urban policy.[82]

The Technical Team met October 16, 1978, to identify and evaluate viable alternatives to the filling and diversion of Turkey Creek.[83] In addition to the Corps, representatives of the following agencies participated in the session: U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, Ohio Environmental Protection Agency, Ohio DNR, Pennsylvania Department of Environmental Resources, Pennsylvania Fish Commission, Ashtabula County Planning Commission, Erie County Health Department, and the City of Conneaut.

On November 2, 1978, U.S. Steel transmitted a revised proposal for harbor pier construction to the District Engineer for evaluation.[84] This information was transmitted to Federal, State, and local agency representatives for review on November 14, 1978.[85]

The Corps requested U.S. Steel to review the possibility that operation of the Lakefront plant could require the addition of activated charcoal filters to the City of Erie

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[80]AR, Vol. 110.

[81]AR, Vols. 110, 111.

[82]AR, Vol. 110.

[83]AR, Vol. 111.

[84]AR, Vol. 111.

[85]AR, Vol. 111.

water treatment system.[86] In addition, U.S. Steel was provided a copy of the minutes of the Federal Regional Council meeting of September 13, 1978, with instructions to respond to each of the issues identified. The Corps also requested the Commonwealth of Pennsylvania to furnish minutes of a meeting addressing on-site mitigation and a copy of the report of Dr. Milo Bell, the Commonwealth's consultant, on the subject of mitigation.[87]

On November 17, 1978, the Corps staff met with representatives of the League of Women Voters of Erie County to discuss environmental issues related to the construction and operation of the proposed plant.[88] Topics of concern included plant-induced secondary growth and development, air quality, water quality, solid waste, and alternatives to the placement of fill in Turkey Creek.

The Corps secured the services of Fry Consultants, Inc. to further evaluate alternative brownfield and greenfield sites within the geographic market area for the proposed Lakefront Steel Plant.

The Corps requested that EPA provide answers to a series of questions on air and water quality issues.[89] A similar request was transmitted to the U.S. Federal Regional Council on November 29, 1978.[90] Responses were received from the EPA on February 12, 1979, and from the Federal Regional Council on January 15, 1979.[91]

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[86]AR, Vol. 111.

[87]AR, Vol. 111.

[88]AR, Vol. 111.

[89]AR, Vol. 111.

[90]Ar, Vol. 111.

[91]AR, Vols. 116, 113.

Between December 1, 1978, and February 9, 1979, U.S. Steel provided technical responses for the comments received during the review period for the DEIS. This information was considered by the Corps staff during preparation of the FEIS. The Corps requested that U.S. Steel resolve all inconsistencies between the data contained in the Fish and Wildlife Management Plan prepared by Fahringer, McCarty and Grey, Inc., and the DEIS.[92] A follow-up request was transmitted to U.S. Steel on January 22, 1979.[93] The Corps furnished copies of the plan to the Technical Team and other governmental officials, requesting their comments.[94] The Technical Team was also advised that a plan for resolution of siting and design problems associated with the raw water intake for the proposed steel plant had been formulated.[95]

On January 12, 1979, Fry Consultants, Inc., submitted its report on the analysis of alternative sites for the proposed U.S. Steel Lakefront Plant.[96]

The Technical Team met on January 18, 1979, to consider additional aquatic studies associated with the siting of the raw water intake for the proposed steel plant.[97] The U.S. Fish and Wildlife Service forwarded the completed scope of work to the Corps on February 8, 1979.[98].

Copies of all comments on the Fish and Wildlife Management Plan were sent to U.S. Steel for review. In the letter of transmittal, the Corps specifically pointed out that the

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[92]AR, Vol. 112.

[93]AR, Vol. 113.

[94]AR, Vol. 113.

[95]AR, Vol. 112.

[96]AR, Vol. 113.

[97]AR, Vol. 113.

[98]AR, Vol. 116.

February 14, 1979, correspondence from the U.S. Fish and Wildlife Service represented advance notice of itent to request permit denial.[99]

On April 2, 1979, The FEIS was forwarded to the Division Engineer, North Central Division for review and transmittal to higher authority.[100] The Division Engineer completed his review of the FEIS and forwarded it to the Office of the Chief of Engineers in Washington, D.C., for further review and forwarding to the EPA.[101]

On May 4, 1979, a notice appeared in the Federal Register indicating that the FEIS had been filed with the EPA on April 26, 1979.[102] Copies of the FEIS were distributed to Federal, State, and local agencies, public interest groups and interested individual on April 26, and 27, 1979.[103] The official 30-day comment period began on April 26, 1979. A notice of availability was widely distributed throughout the regional impact area on April 27, 1979.[104].

The official position of the Commonwealth of Pennsylvania was provided by the State Clearinghouse.[105]

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[99]AR, Vol. 116.

[100]AR, Vol. 117.

[101]AR, Vol. 117.

[102]AR, Vol. 117.

[103]AR, Vol. 117.

[104]AR, Vol. 117.

[105]AR, Vol. 117.

APPENDIX B

OFFICE OF THE CLERK

United States Court of Appeals

21400 United States Courthouse

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SALLY MRVOS
CLERK

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[*sic*] September 27, 1983

(Blair S. McMillin, Esquire
(Thomas R. Wright, Esquire
(Eric A. Schaffer, Esquire
Reed, Smith, Shaw & McClay
Union Trust Building
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Pittsburgh, PA. 15230

Re: Lake Erie Alliance for the Protection of the Coastal Corridor, etc., et al., Appellants v. U.S. Army Corps of Engineers, etc., et al.- No. 82- 5156.

Dear Counsel:

At the oral argument of the above case on January 23rd the Court expressed concern that this case might be moot in view of the lapse of time and the fact that the corporation has apparently not gone ahead with its planned construction.

The Court would like to be advised within fifteen (15) days from the date of this letter whether the case is moot in the corporation's view. An original and three (3) copies of

your response should be filed with certificate of service on opposing counsel.

Very truly yours,

SALLY MRVOS, Clerk

By: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk

mef

cc: Staughton Lynd, Esquire
Brent L. English, Esquire
Martin Green, Esquire

APPENDIX C

REED SMITH SHAW & McCLAY
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February 9, 1983

M. Elizabeth Ferguson
Chief Deputy Clerk
United States Court of Appeals
For The Third Circuit
21400 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, PA 19106

Re: Lake Erie Alliance for the Protection of the Coastal Corridor, etc., et al., Appellants v. Army Corps of Engineers, etc., et al.-No. 82-5156.

Dear Ms. Ferguson:

In response to your letter dated [sic] January 27, 1983 and the inquiry by the Court as to the present plans of United States Steel corporation (USS) for the construction of a

new steel mill at Conneaut, Ohio, pleased be advised that USS does not consider this case moot.

In this regard, the Permit issued by the Corps of Engineers for the construction of the mill does not even require that construction be commenced until December 31, 1983. Permit No. 77-492-3 (effective June 18, 1979) provides in Special Condition (4):

> "(4) That General Condition (o) is hereby amended to read as follows: That if the activity authorized herein is not started on or before the 31st day of December 1983 and is not completed on or before the 31st day of December 1989, this permit, *if not previously revoked or specifically extended, shall automatically expire.*" [Emphasis Added].

REED SMITH SHAW & McCLAY

M. Elizabeth Ferguson
Page -2-
February 9, 1983

In the view of USS the Permit is still a valid Permit, and USS wishes to retain all of its rights under the Permit.

By reason of the foregoing, USS respectfully submits that neither Article III nor policy considerations preclude review and disposition of the issue on appeal. Accordingly, as counsel for USS, we strongly urge the Court to reinstate its judgment order dated January 25, 1983, affirming the judgment of the district court.

Respectfully submitted.

/s/ Thomas K. Wright

Thomas R. Wright
REED SMITH SHAW & McCLAY

Attorneys for Intervenor,
United States Steel Corporation.

Of Counsel:

John A. Byerly, Jr., Esq.
General Attorney—Real Estate
United States Steel Corporation

TRW:eac

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5156

LAKE ERIE ALLIANCE FOR THE PROTECTION OF THE COASTAL CORRIDOR, et al.,

Appellants,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.

[Civil No. 79-110 - W. D. Pa. - Erie]

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is counsel for the Intervenor, United States Steel Corporation, in the above-captioned matter, and that a copy of the foregoing has been served on the following counsel of record by United States Mail, postage prepaid, this 9th day of February, 1983:

Staughton Lynd, Esq.
Northeast Ohio Legal Services
804 Metropolitan Tower
Yongstown, OH 44503

Brent L. English, Esq.
Weiner, Orkin, Abbate & Suit Co., L.P.A.
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Martin Green, Esq.
Department of Justice
Washington, D.C. 20530

/s/ Thomas K. Wright

Thomas R. Wright

APPENDIX D

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Richard G. Wilkins
Office of the Solicitor General
United States Department of Justice
Washington, D.C. 20530

Re: Lake Erie Alliance for the Protection of the Coastal Corridor, et al. v. United States Army Corps of Engineers, et al.

Dear Mr. Wilkins:

This will confirm our conversation today in which I advised you that United States Steel Corp. does not presently plan to begin construction of the proposed Conneaut mill.

Very truly yours,

REED SMITH SHAW & McCLAY

By

Eric A. Schaffer

EAS:cal
cc: John A. Byerly, Jr., Esquire